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SUPREME COURT OF THE UNITED STATES

October Term, 1929.

No. 47.

HENRY FORD & SON, INC.,

Petitioner,

vs.

LITTLE FALLS FIBRE COMPANY, ASBESTOS SPINNING AND WEAVING CORPORATION and HARRY A. FURMAN, CHARLES H. BURROWS and CLARENCE T. WRIGHT, as Receivers of Mohawk Paper Makers, Inc.,

Respondents.

BRIEF FOR PETITIONER.

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Subject Index.

	Page
Opinions Below	1
Jurisdiction	2
Statement of the Case	4
Specification of Errors	9
Summary of Argument	10
Argument	13
I. Petitioner's complete justification is found in its license from the Federal Power Commission, as supplemented by the regulations approved by the Secretary of War, which govern the installation of the flashboards	13
1. The Hudson and Mohawk Rivers are navigable waters of the United States	13
2. Navigation in the Hudson River is subject to the control of Congress	14
3. Such control has been undertaken by Congress	15
4. Congress has lawfully delegated to the Federal Power Commission power to authorize the erection of flashboards	15
5. The Commission has authorized petitioner to erect flashboards	16
6. The flashboards thereupon became lawful structures because Congress, through its control over navigation, could grant to petitioner the right to place obstructions in the river in the interest of navigation	17
7. The installation of flashboards is beneficial to navigation	17

Page

(a) The Federal Power Commission has so found 17

(b) Such finding is conclusive 19

(c) The testimony substantiates such finding 21

8. Wisconsin v. Illinois, 278 U. S. 367, is distinguishable 23

9. The motive of the Federal Government in authorizing the flashboards and of the petitioner in erecting them is immaterial 25

10. What the Federal Government, itself, could have done legally it can lawfully accomplish through the agency of the petitioner 26

II. There is nothing in the authority under which petitioner has acted, or in the Federal Constitution, which justifies interference by the Courts 33

1. Section 10-C of the Federal Water Power Act does not give a cause of action 33

2. The just compensation clause of the Fifth Amendment to the United States Constitution does not afford a basis for the judgment 35

(a) There has been no "taking" 35

(b) There has been no deprivation of "private property" 38

(c) Monongahela Navigation Co. v. U. S., 148 U. S. 312, United States v. Lynah, 188 U. S. 445, United States v. Cress, 243 U. S. 316, and Pumpelly v. Green Bay Co., 13 Wall. 166, are distinguishable 39

III. The judgment under review should be reversed and the cause remanded 46

Table of Cases Cited.

	Page
Alabama Power Co. v. Gulf Power Co., 283 Fed. 606	30, 31
Atwater v. Trustees of Canandaigua, 124 N. Y. 602	29, 30
Appleby v. City of New York, 271 U. S. 364	39
Bedford v. United States, 192 U. S. 217	36, 39
Bellinger v. N. Y. C. R. R. Co., 23 N. Y. 42	30
California v. Deseret W. O. & I. Co., 243 U. S. 415	3
Canal Appraisers v. People *ex rel.* Tibbits, 17 Wend. (N. Y.) 571	40, 41, 45
C. B. & Q. Ry. v. Drainage Commissioners, 200 U. S. 561	3, 36
Central Pacific R. R. v. California, 162 U. S. 91	28
Chase-Hibbard Co. v. City of Elmira, 207 N. Y. 460	26, 29, 30
Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292	31
Clallam Co. v. United States, 263 U. S. 341	28
Creswill v. Knights of Pythias, 225 U. S. 246	23
Cubbins v. Mississippi River Com., 241 U. S. 351	27
Danes v. New York, 219 N. Y. 67	14, 40, 41, 45
Economy Light & Power Co. v. United States, 256 U. S. 113	14
First National Bank v. Anderson, 269 U. S. 341	32
First National Bank v. Hartford, 273 U. S. 548	23
Fulton L., H. & P. Co. v. New York, 200 N. Y. 400	40, 45
Gibson v. United States, 166 U. S. 269	36, 37, 38, 45
Gibbons v. Ogden, 9 Wheat. 1	14, 32
Gilman v. Philadelphia, 3 Wall. 713	14
Green Bay Co. v. Patten Paper Co., 172 U. S. 58	3, 19, 26, 30, 31
Greenleaf Lumber v. Garrison, 237 U. S. 251	39
Hannibal Bridge Co. v. United States, 221 U. S. 194	16
Hinkley v. New York, 234 N. Y. 309	40
Hudson River Regulating District v. F. J. & G. R. R. 249 N. Y. 445	25

Page

Hughes v. United States, 230 U. S. 24 27
Indian, etc., Co. v. Oklahoma, 240 U. S. 522 31
Interstate Amusement Co. v. Albert, 239 U. S. 560 23
Jackson v. United States, 230 U. S. 1 27
Japanese Immigrant Case, 189 U. S. 86 18
Jaybird Mining Co. v. Weir, 271 U. S. 609 ..... 30, 31
Kaukauna Co. v. Green Bay Co., 142 U. S. 254 26
Kiff v. Youmans, 86 N. Y. 324 26
Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82 39
Louisville Bridge Co. v. United States, 242 U. S. 409 16
Miller v. Mayor of New York, 109 U. S. 385 .... 17, 20, 32
Monongahela Bridge Co. v. United States, 216 U. S. 177 ..... 20, 32
Monongahela Navigation Co. v. United States, 148 U. S. 312 ..... 36, 39
New Jersey v. Sargent, 269 U. S. 328 14
New York & Queens Gas Co. v. McCall, 245 U. S. 345 19
Northern Pacific Ry. v. North Dakota, 236 U. S. 585 23
Norfolk & Western Ry. Co. v. W. Virginia, 236 U. S. 605 23
Pennsylvania v. Wheeling, etc., Bridge Co., 18 Howard 421 ..... 17, 32
People v. Gilchrist, 221 App. Div. (N. Y.) 19 14
People v. Hudson River Con. R. R. Co., 228 N. Y. 203; 254 U. S. 631 17
People *ex rel.* Loomis v. Canal Appraisers, 33 N. Y. 461 ..... 14, 41
People v. N. Y. & O. Power Co., 219 App. Div. (N. Y.) 114 14
Philadelphia Co. v. Stimson, 223 U. S. 605 16
Philadelphia & Trenton R. R. v. Stimpson, 14 Peters 448 ..... 18, 19, 21

Page

Postal Telegraph & Cable Co. v. Newport, 247 U. S. 464 23
Pumpelly v. Green Bay Co., 13 Wall. 166 39
Sanitary District v. United States, 266 U. S. 405 16, 46
Scott v. Donald, 165 U. S. 58 34
Scranton v. Wheeler, 179 U. S. 141 ..... 39, 45
Shively v. Bowlby, 152 U. S. 1 3
Smith v. Kansas City Title Co., 255 U. S. 180 26, 32
South Carolina v. Georgia, 93 U. S. 4 ..... 17, 19, 45
Southern Pacific v. Olympian Dredging Co., 260 U. S. 205 ..... 18, 20
Southern Pacific R. R. v. United States, 183 U. S. 519 28
Stanley v. Schwalby, 162 U. S. 255 3
The Daniel Ball, 10 Wall. 557 13
The Montello, 20 Wall. 430 14
Transportation Co. v. Chicago, 99 U. S. 635 28, 34, 36, 39
Transportation Co. v. Parkersburg, 107 U. S. 691 27
Union Bridge Co. v. United States, 204 U. S. 364 ..... 16, 20, 32, 38
Union Pacific v. Public Service Com., 248 U. S. 67 23
United States v. Chandler-Dunbar Co., 229 U. S. 53 ..... 14, 19, 21, 25, 37, 38, 45
United States v. Cress, 243 U. S. 316 ..... 39, 45
United States v. Lynah, 188 U. S. 445 39
Waite v. Dowley, 94 U. S. 527 32
Waterloo Mfg. Co. v. Shanahan, 128 N. Y. 345 26
W. Chicago Railway v. Chicago, 201 U. S. 506 39
Westfall v. United States, 274 U. S. 256 28
Wisconsin v. Duluth, 96 U. S. 379 ..... 19, 28
Wisconsin v. Illinois, 278 U. S. 367 ..... 16, 23, 31

Statutes Cited.

	Page
Act of Congress of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937, Judicial Code, Sec. 237 (b); U. S. Code, Title 28, Sec. 344 (b)	2
Federal Water Power Act, June 10, 1920, C. 285, 41 Stat. 1063; U. S. Code, Title 16, Ch. 12	5, 15
Act of Congress of June 25, 1910, 36 Stat. 382	15
Act of Congress of March 4, 1913, 37 Stat. 144	15
Tucker Act, Judicial Code, Sec. 24, Par. 20; 28 U. S. C., Sec. 41, Par. 20	34, 39

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HENRY FORD & SON, Inc.,
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LITTLE FALLS FIBRE COMPANY, ASBESTOS SPINNING AND WEAVING CORPORATION and HARRY A. FURMAN, CHARLES H. BURROWS, and CLARENCE T. WRIGHT, as Receivers of Mohawk Paper Makers, Inc.,
Respondents.

BRIEF FOR PETITIONER.

Opinions Below.

The opinions of the State courts are reported as follows:

Temporary Injunction: 126 Misc. (N. Y.) 126.

Supreme Court: 127 Misc. (N. Y.) 834 (R. 9).

Appellate Division: 223 App. Div. (N. Y.) 559 (R. 251).

Court of Appeals: 249 N. Y. 495 (R. 263).

Jurisdiction.

1. Date of final judgment to be reviewed is December 31, 1928 (R. 259).

2. The petition for certiorari was filed March 7, 1929, and the writ granted on April 15, 1929.

3. The statutory provisions, under which the jurisdiction of this court is invoked, are contained in the Act of February 13, 1925, ch. 229, sec. 1; 43 Stat. 937 (Judicial Code, Sec. 237 (b); U. S. Code, Title 28, Sec. 344 (b)).

4. The following claims were advanced by petitioner in the State courts, each of which was denied:

(a) That the Federal Water Power Act, a license issued by the Federal Power Commission to petitioner, and regulations approved by the Secretary of War constituted and afforded to petitioner a title, right, privilege and immunity to install and maintain flashboards on the Federal dam in the Hudson River at Troy (R. 8, 30).

(b) That the title, right, privilege and immunity so set up and claimed by petitioner, are not contravened by the just compensation clause of the Fifth Amendment to the Constitution of the United States (R. 31).

(c) That the title, right, privilege and immunity, so set up and claimed by petitioner, are not affected by the provisions of Section 10 (c) of the Federal Water Power Act (U. S. Code, Title 16, ch. 12, sec. 803-c) (R. 31).

(d) That in installing and maintaining said flashboards petitioner acted for and as an agency of the Government

of the United States which, in the exercise of the power of Congress to regulate commerce with foreign nations and among the several States, under Clause 3 of Section 8 of Article I of the Constitution of the United States, has authorized, approved and provided for the installation and maintenance of said flashboards for the improvement of navigation, in furtherance of interstate and foreign commerce (R. 8, 30-31).

5. This court has jurisdiction.

Shively v. Bowlby, 152 U. S. 1, 9-10;
Stanley v. Schwalby, 162 U. S. 255, 279;
Green Bay Co. v. Patten Paper Co., 172 U. S. 58;
California v. Deseret W. O. & I. Co., 243 U. S. 415, 417;
C. B. & Q. Ry. v. Drainage Commissioners, 200 U. S. 561, 580-581.

In the last case cited above, this court said, at page 581:

> "The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for, the supreme law of the land must always control. Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States."

Statement of the Case.

Respondents are the owners of certain land, riparian and water rights and water power rights upon the so-called north or fourth branch of the Mohawk river, west of the confluence thereof with the Hudson river, in the town of Waterford, Saratoga County, New York, at which site, for about one hundred years last past, respondents and their respective predecessors in title have jointly owned and maintained a dam across said branch of the Mohawk, and a power canal leading from the pool formed by said dam, for the purpose of developing and using water power in the mills and factories of the respondents which are severally owned by them upon the land adjacent thereto (R. 18, 23).

Prior to the year 1915, there existed across the Hudson River, extending from the City of Troy westerly to the Village of Green Island, a so-called State dam, the crest elevation of which was 13.23 feet barge canal *datum*, with flashboards two feet in height upon the crest thereof (R. 18-19, 23-24). About the year 1915, the United States of America, pursuant to Acts of Congress (R. 24), completed the construction of a concrete dam known as the Federal dam, across the Hudson River, a short distance above the site of said State dam, about 15,000 feet or nearly three miles below respondents' plants. This new Federal dam replaced the old State dam (R. 18, 24), and has at its easterly end a lock for the passage of boats (R. 51). It consists of two spillways, of which the east or so-called main spillway, extending perpendicularly out from the east bank of the river, has an elevation at the crest of 15.2 feet, while the west or so-called auxiliary spillway, extending diagonally downstream to the west bank of the river, has

an elevation at the crest of 17.2 feet (R. 19, 24). When the United States Government constructed this dam *it provided on the main or easterly spillway concrete holes for the installation of flashboards* (R. 24).

The Federal Power Commission, a body consisting of the Secretary of War, the Secretary of the Interior and the Secretary of Agriculture, was established by the Act of Congress approved June 10, 1920, known as the Federal Water Power Act (June 10, 1920; c. 285, 41 Stat. 1063; U. S. Code, Title 16, Ch. 12) (R. 24-25). On December 22, 1920, petitioner, a corporation of the State of New York, authorized and empowered to utilize water power and to do all business necessary to effect the purposes of a license under said Federal Water Power Act (R. 25), filed with said Commission its application for a license for an hydro-electric power project at the westerly end of said Federal dam in the village of Green Island (R. 25). This application contained, among others, the following statements:

> "The applicant will erect flashboards along the main spillway section of the dam as contemplated and provided for by the Corps of Engineers of the United States Army. The level of the water in the pond will not be drawn below the present crest of the dam and navigation will not be interfered with in any way" (R. 25) (Petitioner's Exhibit 9, page 5, filed in U. S. Supreme Court Clerk's office).
>
> "Flashboards two feet in height will be used on the main spillway section of dam utilizing the holes provided for that purpose in the spillway crest."
>
> "No flashboards will be used on auxiliary spillway section."

"The flashboards will cause the pool level to be slightly higher than at present with ordinary flow conditions but in flood times the flashboards will go out and the flood level will be no higher than at present. In low water conditions the water level in the pool may be either slightly higher or lower than at present, depending on the daily load curve of the power station" (R. 25, Petitioner's Exhibit 9, pages 27-28).

"The use of flashboards will result in the creation of a reserve of water ponded during the night when the entire flow is not required. The water thus conserved will be available for lockage purposes and will increase the power available at times of low river flow. Flashboards will also provide a greater average head on the water wheels and will consequently permit the generation of more power with the same amount of water."

"In brief the use of flashboards on the dam will result in a higher degree of 'conservation and utilization in the public interest of the available water resources for purposes of both power and navigation'" (R. 26, Petitioner's Exhibit 9, pages 32-33).

On March 3, 1921, the Federal Power Commission granted petitioner's said application and issued to petitioner its water power license, in and by the terms of which the application of petitioner was made a part of the license (R. 26, 236-243).

Petitioner was authorized by this license to construct, maintain and operate a power plant at the westerly end of the Federal dam. In or about the year 1922, acting under the license thus granted by the Federal Power Commission, petitioner constructed an hydroelectric power plant at the location specified, and ever

since then it has operated said plant by means of water drawn from the pool formed by the Federal dam (R. 18, 27).

In the license the Federal Power Commission found, among other things: "that the said project, including the maps, plans, and specifications are best adapted to a comprehensive scheme of improvement and utilization of said stream *for purposes of navigation,* of water-power development, and of other beneficial uses; and that the contemplated improvement is desirable and justified in the public interest for the purpose of improving and developing the Hudson River for the use and benefit of interstate or foreign commerce" (R. 26-27, 237).

Since the application of petitioner contained statements that it would erect flashboards on the main spillway of the dam, and the Federal Power Commission found that the maps, plans and specifications contained in the application were best adapted to the improvement of the stream for purposes of navigation and that the contemplated improvement was desirable for the purpose of improving the Hudson river for the benefit of interstate and foreign commerce, there was an express finding by the Commission that flashboards were an aid to navigation.

Paragraph 7 of said license provides:

> "The Licensee shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of pools, as may be made from time to time by the Secretary of War" (R. 27, 239).

Sec. 18 of the Act contains the same provision (U. S. Code, Title 16, Sec. 811).

By the granting of the license petitioner was authorized by the Federal Power Commission to erect flashboards, because they were provided for in the application, which was made a part of the license, and the licensee was authorized to construct the works described in the application (R. 237). But, under paragraph 7 of the license last above quoted, and Section 18 of the Act, the Secretary of War might at any time compel their removal or make other rules and regulations with reference to the level of the pool. Consequently it was highly desirable for petitioner to ascertain the attitude of the Secretary of War.

Accordingly petitioner, in a letter dated September 22, 1924 (R. 234), requested the War Department "that we be permitted to install flashboards on the Troy dam in connection with the operation of our power house," in accordance with blueprints attached to said letter (R. 27). The War Department, on January 12, 1925, wrote a letter to petitioner (R. 235), in which there were enclosed certain regulations approved by the Secretary of War on December 2, 1924, governing the pool level and maintenance of flashboards at the Federal dam (R. 27-28, 244). These regulations provide for the maintenance of flashboards on the east or main spillway of the dam to a height of 17.2 feet barge canal *datum,* which is the same as the height of the crest of the west or auxiliary spillway (R. 28).

On June 16, 1925, the petitioner, acting with due care and skill (R. 30), erected flashboards on the east or main spillway conformably with the provisions of said regulations (R. 28, 29).

The flashboards thus erected raised the elevation of the water at the tail races of respondents' plants

(R. 20), and thereby caused a loss of head to respondents' plants (R. 29).

Respondents commenced this suit in equity on July 17, 1925, in the Supreme Court of New York, Saratoga County, to obtain an injunction against the maintenance of said flashboards and damages alleged to have been caused thereby (R. 2-6). After the issuance of a temporary injunction a trial was had and such judgment granted (R. 68). Petitioner thereupon appealed to the Appellate Division of the Supreme Court (R. 2) where, by a vote of four to one, the judgment was affirmed (R. 247-250). An appeal therefrom to the Court of Appeals of the State of New York (R. 250) resulted in an affirmance and a remittitur to the State Supreme Court (R. 258), upon which judgment was entered whereby the judgment of the Court of Appeals was made the judgment of the Supreme Court (R. 261).

Specification of Errors.

Each of the State courts erred:

1. In refusing to hold that the Federal Water Power Act, the said license of the Federal Power Commission issued to petitioner and the said regulations, approved by the Secretary of War, constituted and afforded to petitioner a title, right, privilege and immunity to install and maintain said flashboards on said Federal dam.

2. In refusing to hold that, in installing and maintaining said flashboards, petitioner acted for and as an agency of the Government of the United States for the improvement of navigation, in furtherance of interstate and foreign commerce.

3. In holding that petitioner, in performing the acts complained of, was not immune from interference by the courts of the State.

4. In holding that the installation of the flashboards was not an aid to navigation, thus substituting its judgment on that subject for the judgment of the Federal authorities who were clothed by Congress with power to determine that question.

5. In holding that the purpose of the Government of the United States, in providing for the installation of said flashboards, was not to aid navigation for the use and benefit of interstate and foreign commerce.

6. In refusing to hold that the provisions of the Fifth Amendment to the Constitution of the United States do not entitle respondents to maintain this action.

7. In refusing to hold that the provisions of Section 10 (c) of the Federal Water Power Act (U. S. Code, Title 16, ch. 12, Sec. 803-c) do not entitle respondents to maintain this action.

8. In holding that respondents' lands were flooded by the maintenance of said flashboards (R. 20), which finding is unsustained by the evidence (R. 71-72).

Summary of Argument.

Petitioner contends that it was completely justified in erecting the flashboards because of a license from Congress, acting through the Federal Power Commission, as supplemented by regulations of the Secretary of War. Our argument may be conveniently divided into two parts showing, on the one hand, the basis for the authority and, on the other, that there is nothing in the

authority, itself, or in the Federal Constitution which justifies the courts in interfering with the act of petitioner.

I.

We are dealing with navigable waters of the United States, over which Congress has control for purposes of navigation. In the exercise of this power, Congress has proceeded to erect a dam across the Hudson River, including a lock for the passage of boats, and has dredged and maintained the channel in the pool formed by the dam which extends to respondents' mills.

Congress has also seen fit to enact the Federal Water Power Act, by which a Commission has been created for the purpose of preserving, enlarging and maintaining the navigable capacity of the waters of the United States over which it has jurisdiction. This Commission, acting within the power delegated to it by Congress, has made a finding that navigation would be benefited by issuing a license to petitioner, which included permission to install the flashboards, whereby the surplus water at this Government dam might be utilized for power purposes, requiring from petitioner, in exchange, that it furnish to the Government electric power for the operation, lighting, repair and upkeep of the lock (R. 239); that it install, maintain and operate, at its own expense, such lights and signals as the Secretary of War might prescribe (R. 239); and that it pay to the United States an annual charge or fee of $5,000.00 for the cost of administration of the Federal Water Power Act and for the use of the Government dam and property (R. 240).

We shall argue that the finding of the Federal Power Commission referred to above, that flashboards are an aid to navigation, is conclusive and binding upon the courts and is not subject to judicial review, except in so far as it may be examined for the purpose of determining whether or not it is arbitrary or capricious, and whether or not the act permitted has a real and substantial relation to the interest of navigation. It will be contended by us that, where a state court has denied a Federal right, this court has the power to review the record and determine for itself whether there is any basis in fact for the state court's decision in this case, that the license granted to petitioner does not result in any development and improvement of navigation. We shall show that the uncontradicted evidence at the trial is that flashboards do benefit navigation and, consequently, that there is a real and substantial relation between the erection of flashboards and the interests of navigation.

Conceding that the purpose of petitioner was confined to the creation of power, we shall demonstrate that, as long as its act was legal, its motive was immaterial; further, that the courts may not inquire into the motives of Congress when its activity is confined within the limits of its constitutional authority, and that it is, therefore, of no concern to the courts what may have prompted Congress in authorizing the Federal Power Commission to grant the license to petitioner.

It will further be our contention that the petitioner has done only what the Federal Government, itself, could do legally and that the courts may not interfere with an act for which Congress has provided, in the exercise of its lawful authority, to improve navigable

waters; that for the courts to so interfere extends beyond their judicial powers and is an attempted usurpation of the legislative function which the Constitution has reposed in Congress alone.

II.

Having shown the basis for our authority, we shall contend that there is nothing in the Federal Water Power Act which creates a cause of action in favor of the respondents; and that the Fifth Amendment to the Constitution of the United States does not afford a basis for the judgment, because there has been no "taking," but only a consequential damage, and because respondents have not been deprived of "private property," inasmuch as their riparian rights are subject and subservient to the paramount right of the Government to make improvements for navigation purposes.

ARGUMENT.

POINT I.

Petitioner's complete justification is found in its license from the Federal Power Commission, as supplemented by the regulations approved by the Secretary of War, which govern the installation of the flashboards.

1. The Hudson and Mohawk Rivers are navigable waters of the United States.

R. 52, 102;
The Daniel Ball, 10 Wall. 557.

(a) They have been so found by the trial court (R. 30), with the qualification that the Mohawk River from Lock No. 2, Erie Canal in Waterford, westerly to the Crescent Dam, is, in fact, incapable of navigation, because of the falls and rapids therein, and that navigation is carried around this stretch of the river by means of the Barge Canal (R. 21).

(b) The mere fact that navigation is carried around the falls and rapids by means of a canal does not make the Mohawk non-navigable, under either the law of New York or the decisions of this court.

People v. Gilchrist, 221 App. Div. (N. Y.) 19, 24;
People v. N. Y. & O. Power Co., 219 App. Div. (N. Y.) 114, 115;
The Montello, 20 Wall. 430;
Economy Light & Power Co. v. United States, 256 U. S. 113;
United States v. Chandler-Dunbar Co., 229 U. S. 53.

(c) The Mohawk has been held by the New York courts to be a navigable stream.

People, ex rel. Loomis v. Canal Appraisers, 33 N. Y. 461;
Danes v. New York, 219 N. Y. 67, 70.

2. Navigation in the Hudson River is subject to the control of Congress.

United States Constitution, Article I, Section 8, Clause 3;
Gibbons v. Ogden, 9 Wheat. 1;
Gilman v. Philadelphia, 3 Wall. 713, 724;
United States v. Chandler-Dunbar Co., 229 U. S. 53, 63;
New Jersey v. Sargent, 269 U. S. 328, 337.

3. Such control has been undertaken by Congress as shown by:

(a) The construction of the Federal dam, authorized by Act of Congress, approved June 25, 1910, being 36 Stat. Chapter 382, and by further appropriation by Act of Congress, approved March 4, 1913, being 37 Stat. Chapter 144 (R. 112).

(b) Dredging and maintaining the channel above the dam by the Federal Government (R. 120, 123, 135).

(c) The Federal Water Power Act, June 10, 1920, Chapter 285, 41 Stat. 1063 (U. S. Code, Title 16, Chapter 12).

(d) The issuance of a license to the petitioner under the provisions of the Federal Water Power Act (R. 236-243, Petitioner's Exhibit 10, filed in the office of the Clerk of United States Supreme Court).

(e) The regulations approved by the Secretary of War to govern the pool level and maintenance of flashboards at the Federal dam (R. 244-245).

4. Congress has lawfully delegated to the Federal Power Commission power to authorize the erection of flashboards.

(a) The Act, itself, empowered the Commission, "to issue licenses * * * to any corporation * * * for the purpose of constructing, operating and maintaining dams * * * or other project works necessary or convenient for the development and improvement of navigation * * *" (U. S. Code Title 16, Sec. 797-d). "Project works" are defined in Section 3 as "the physical structures of a project" and "project" is defined as "complete unit

of improvement or development consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit'' (U. S. Code, Title 16, Sec. 796).

(b) This court has repeatedly held that Congress may delegate such power to an executive officer.

Louisville Bridge Co. v. United States, 242 U. S. 409, 424;
Sanitary District v. United States, 266 U. S. 405, 428;
Union Bridge Co. v. United States, 204 U. S. 364;
Philadelphia Co. v. Stimson, 223 U. S. 605, 638;
Hannibal Bridge Co. v. United States, 221 U. S. 194, 205.
Wisconsin v. Illinois, 278 U. S. 367, 414.

5. The Commission has authorized petitioner to erect flashboards.

(a) The license provides:

> ''Now, Therefore, The Commission hereby licenses the said Henry Ford and Son, Incorporated, to enter upon the lands of the United States, adjoining and appurtenant to the west end of the Government dam at Troy, N. Y.; to occupy and utilize the said lands and the banks, shores, bed, and surplus water of said river; to construct on said lands and in said river at the location specified the works described in said application and by the maps, field notes, plans, specifications, estimates, and other data thereto attached; to make the alterations in the Government dam as specified; to dredge, excavate, and construct the additional channels in accordance with said plans; to divert the surplus waters of the said stream and to utilize the same and the water powers

created by the said Government dam, in the amount and manner set forth in said application, and to maintain and operate said works in accordance with the proposals set forth in said application; * * *" (R. 237).

(b) Flashboards were a part of the works described in the application and in the plans and specifications attached thereto (R. 25-26; Petitioner's Exhibit 9, filed in United States Supreme Court Clerk's Office, pages 5, 27-28, 32-33).

6. The flashboards thereupon became lawful structures because Congress, through its control over navigation, could grant to petitioner the right to place obstructions in the river in the interest of navigation.

Pennsylvania v. Wheeling, &c. Bridge Co., 18 Howard 421;
South Carolina v. Georgia, 93 U. S. 4;
Miller v. Mayor of New York, 109 U. S. 385;
People v. Hudson River Connecting R. R. Co., 228 N. Y. 203; Certiorari denied, 254 U. S. 631.

7. The installation of flashboards is beneficial to navigation.

(a) *The Federal Power Commission has so found* (R. 26-27, 237).

As stated above, the maps, plans and specifications, submitted by petitioner to the Commission in its application for a license, contained statements that petitioner would erect flashboards along the main spillway section of the dam, as contemplated and provided for by the corps of engineers of the United States Army, and that such flashboards, 2 feet in height, would be used

on the main spillway section of the dam, utilizing the holes provided by the Federal Government for that purpose in the spillway crest (R. 25; Petitioner's Exhibit 9, pages 5, 27-28).

The Commission, in granting the license, found as follows:

> "Whereas, The Commission finds that the said project, including the maps, plans, and specifications, are best adapted to a comprehensive scheme of improvement and utilization of said stream for purposes of navigation, of water power development, and of other beneficial uses; and that the contemplated improvement is desirable and justified in the public interest for the purpose of improving and developing the Hudson River for the use and benefit of interstate or foreign commerce" (R. 237).

In addition to this express finding by the Commission, that flashboards are an aid to navigation, the Secretary of War has presumably so found by his approval, pursuant to Section 18 of the Act (16 U. S. C. Sec. 811), of the regulations governing the use of flashboards (R. 244-245).

Southern Pacific Co. v. Olympian Dredging Co., 260 U. S. 205;
Philadelphia & Trenton R. R. v. Stimpson, 14 Peters 448;
Japanese Immigrant Case, 189 U. S. 86, 98.

In the *Olympian Dredging Co.* case, page 208, this court said:

> "In the light of this general assumption by Congress of control over the subject and of the large powers delegated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authoritative determi-

> nation of what was reasonably necessary to be done to insure free and safe navigation so far as the obstruction in question was concerned."

And in *Philadelphia & Trenton R. R. Co. v. Stimpson,* at page 457, it used this language:

> "It is a presumption of law, that all public officers, and especially such high functionaries, perform their proper official duties, until the contrary is proved."

(b) *Such finding by the Federal Government is conclusive.*

There is no room for judicial review, at the instance of a private owner along the banks of a navigable stream, of a determination by the Federal Government that the flow of the stream is needed for the improvement of navigation.

> *United States v. Chandler-Dunbar Co.,* 229 U. S. 53, 64-65.

The determination by the duly authorized officers of the United States that the flashboards aid navigation, unless palpably fraudulent, is conclusive and binding upon the courts.

> *South Carolina v. Georgia,* 93 U. S. 4;
> *Wisconsin v. Duluth,* 96 U. S. 379;
> *Green Bay Co. v. Patten Paper Co.,* 172 U. S. 58;
> *New York & Queens Gas Co. v. McCall,* 245 U. S. 345.

A finding by a department or officer of the Federal Government, detailed by Congress to determine the fact that the erection of a given structure in navigable waters of the United States is in the interest of interstate and foreign commerce, is conclusive.

Miller v. Mayor of New York, 109 U. S. 385, 393-394;
Union Bridge Co. v. United States, 204 U. S. 364, 386;
Monongahela Bridge Co. v. United States, 216 U. S. 177, 195;
Southern Pacific v. Olympian Dredging Co., 260 U. S. 205.

In the *Monongahela Bridge Company* case, at page 195, this court used the following language:

> "It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers conform their action to the mode prescribed by Congress."

Such finding was made on sufficient evidence before the Commission, despite the statement of the Court of Appeals in its opinion that the finding was made without taking evidence to support it (R. 265). The application (Petitioner's Exhibit 9) was before the Commission. At page 118 of the record, Col. Burr testified that the application, when submitted, contained statements of facts upon which conclusions were reached as to what changes were desirable therein in the interests of navigation.

The license recites that the application has been made "in due and proper form" (R. 236). Section 9 of the Act provides that each applicant for a license shall submit to the Commission:

"(a) Such maps, plans, specifications and estimates of cost *as may be required for a full understanding of the proposed project*" (16 U. S. C. Sec. 802).

It is apparent, therefore, that, since the Commission has found that the application was made in due form and that, since due form, as required by the Act, includes a statement of sufficient facts before the Commission as may be required for a full understanding of the project, there was before the Commission sufficient facts upon which to base this finding.

We again quote from *Philadelphia & Trenton R. R. v. Stimpson,* 14 Peters 448, where this court used the following pertinent language, at page 457:

"Where, as in the present case, an act is to be done, or patent granted, upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act or granted the patent, is *prima facie* evidence that the proofs have been regularly made, and were satisfactory."

(c) The rule clearly deducible from the authorities is that Congress, in the exercise of its power over navigable waters, may adopt, *in its judgment,* any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution (*United States v. Chandler-Dunbar Co.,* 229 U. S. 53), as long as it does not *arbitrarily or capriciously* destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end; further, that the judgment of Congress or its duly authorized agencies, such as the Federal Power Commission or the Secretary of War, is conclusive and

binding upon the courts, and the latter may not review the action of Congress or its agencies as long as it or they do not act arbitrarily or capriciously. If it is apparent that there is a real and substantial relation to the control of navigation, regardless of the *necessity* of adopting the means employed, the courts will inquire no further. Flashboards may or may not be *necessary* for navigation purposes, but this is of no concern to the courts, provided they be beneficial to navigation.

Thus, the inquiry in the present case must be confined to the question of whether or not the finding of the Commission and the Secretary of War, that flashboards do benefit navigation, is so arbitrary or capricious that their erection has no real or substantial relation to the control of navigation.

No one will assert that the action of the Federal Government has been arbitrary or capricious, or done for the purpose of damaging the respondents as riparian owners. That there is a real and substantial relation between the use of flashboards and the preservation, control and enlargement of navigation and navigable capacity of the Hudson River is conclusively shown by the testimony of three witnesses for the petitioner (R. 102-112, 117-152, 173-174). This testimony was not contradicted or disputed by respondents, who offered no proof that the use of flashboards is a detriment to navigation, or that there is no substantial relation between flashboards and navigation.

When a Federal right, set up in a state court, is denied there, this court will review the record and determine for itself whether there is any basis in

fact for the state court's decision and, if it finds none, it will correct the error.

Creswill v. Knights of Pythias, 225 U. S. 246;
Northern Pacific Railway v. North Dakota, 236 U. S. 585, 593;
Norfolk & Western Railway v. West Virginia, 236 U. S. 605, 610;
Interstate Amusement Co. v. Albert, 239 U. S. 560;
Postal Telegraph & Cable Co. v. Newport, 247 U. S. 464, 473;
Union Pacific v. Public Service Com., 248 U. S. 67;
First National Bank v. Hartford, 273 U. S. 548, 552-553.

8. Wisconsin v. Illinois, 278 U. S. 367, is distinguishable.

(a) In that case, Congress had taken no *affirmative* action to promote navigation interests. This is apparent, on pages 416-417 of the opinion, where this court confirms the conclusion of the Master, that Congress had taken no affirmative steps to open a waterway from the Great Lakes to the Mississippi and, again, at page 420—"in the absence of direct authority from Congress for a waterway from Lake Michigan to the Mississippi * * *"; also, the drainage canal had been constructed by the State of Illinois and the Sanitary District, not by the Federal Government, for the purpose of caring for the sewage of Chicago.

In our case, Congress has taken affirmative action for the purpose of promoting navigation in the Hudson by building the dam, by maintaining a lock for boats, by dredging the channel, by authorizing the Federal

Power Commission to grant a license to petitioner, and by granting the license.

(b) In that case, the permit of the Secretary of War was granted under Section 10 of the Act of March 3, 1899 (page 406), under which "the true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited" (page 413); here, the permit is a part of the plan of development of navigation improvements undertaken by Congress.

(c) In that case, there was no finding by Congress, or the Secretary of War acting for it, that the diversion was needed for navigation purposes; here, there is a conclusive finding, by a body empowered to make it, that the use of flashboards is beneficial to navigation.

(d) In that case, the power of the Secretary of War, under Section 10 of the Act of March 3, 1899, was to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversions (page 417); here, the power of the Commission has been extended by Congress to enlarging the navigable capacity of the Hudson River. In the *Drainage Canal* case, there was no express authorization by Congress of the diversion; here, there is express authorization in the Federal Water Power Act. The distinction is that, in the one case, there was only permissive consent or waiver by Congress, acting through the Secretary of War; while, in the other, we have an affirmative act of Congress in the improvement of navigable waters, as exerted by it through the medium of the Federal Power Commission.

9. The motive of the Federal Government in authorizing the flashboards and of the petitioner in erecting them is immaterial.

The Court of Appeals said:

> "The evidence on the trial clearly establishes the fact that the flashboards are neither authorized by the Commission nor maintained by defendant except for the private purposes of defendant in developing power and that their erection has no relation to 'the interests of navigation' except that they must not interfere with navigation" (R. 267; 249 N. Y. 495, 502).

Here, again, the Court of Appeals erred in substituting its judgment for that of the Federal Government (Point I, 7 (b), *supra*, page 19). Since the Federal Government has decided that the flashboards aid navigation (Point I, 7 (a), *supra*, page 17), it is of no consequence that additional power is incidentally created (*Hudson River Regulating District v. F. J. & G. R. R.*, 249 N. Y. 445, 453). The same argument, that the use of a given structure was a commercial one rather than an improvement in navigation, was answered by this court in *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 72-73, where it said, at page 73:

> "If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government."

Petitioner has purchased from the Federal Government the right to erect these flashboards, which were specified in the application for a license (R. 25); and, in paying the license fee to the Government, called for in Section 12 of the license (R. 239-240), it has ac-

quired from the Government something which the Government owned and had the right to sell.

Kaukauna Co. v. Green Bay Co., 142 U. S. 254, 273;
Green Bay Co. v. Patten Paper Co., 172 U. S. 58.

This court has said that "nothing is better settled by the decisions of this court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives."

Smith v. Kansas City Title Co., 255 U. S. 180, 210.

The petitioner, having been properly authorized by the Government to install the flashboards, was exercising a legal right and its motive was immaterial. The Court of Appeals of New York has said that "The exercise of a legal right cannot be affected by the motive which controls it" (*Kiff v. Youmans*, 86 N. Y. 324, 329). If petitioner's act was legal because authorized by competent authority, the act did not become illegal because of any motive or reason which actuated petitioner in its performance.

Waterloo Mfg. Co. v. Shanahan, 128 N. Y. 345, 362;
Chase-Hibbard Co. v. City of Elmira, 207 N. Y. 460, 467.

10. What the Federal Government, itself, could have done legally, it can lawfully accomplish through the agency of the petitioner.

(a) If the Federal Government, itself, had built the crest of the main spillway to a permanent height of 17.2

feet, equal to the height of the auxiliary spillway, or if it had installed upon the crest of the main spillway, utilizing the concrete holes which it had placed there for such purpose, the very flashboards of which respondents complain, no one would have the temerity to urge seriously that a court should issue against the Federal Government an injunction such as the state courts have granted here.

> "It is Congress and not the Judicial Department to which the Constitution has given the power to regulate commerce with foreign nations and among the several states" (*Transportation Co. v. Parkersburg,* 107 U. S. 691, 701).

Respondents contended below that the new Federal dam, by its increased height of 2 feet on the main spillway over the old State dam, deprived them of 2 feet of head, which they had previously enjoyed before the removal of the State dam and the erection of the Federal dam. There is nothing to indicate that respondents ever complained of that; nor would they have complained against the Federal Government if, instead of 2 feet, they had been deprived of 4 feet by a raising of the main spillway to a permanent height of 17.2 feet, because respondents know that their water rights are held subject to the paramount power of Congress to make improvements in a navigable river in aid of navigation. In such a case, they would have been remediless in the absence of any taking of their property.

Cubbins v. Mississippi River Commission, 241 U. S. 351;
Jackson v. United States, 230 U. S. 1;
Hughes v. United States, 230 U. S. 24.

(b) It is not for the courts to forbid the completion

or require the undoing of an improvement in navigable waters for which Congress, in the exercise of its lawful authority, has provided.

Wisconsin v. Duluth, 96 U. S. 379.

In that case, this court said, at page 383:

> "It cannot be necessary to say that when a public work of this character has been inaugurated or adopted by Congress, and its management placed under the control of its officers, there exists no right in any other branch of the Government to forbid the work, or to prescribe the manner in which it shall be conducted."

(c) Congress may employ a state corporation as an instrumentality of the United States and such corporation is to be regarded as the agent of the Federal Government in respect to the exercise of powers conferred upon the corporation by the Federal Government in furtherance of Federal ends.

Clallam Co. v. United States, 263 U. S. 341;
Westfall v. United States, 274 U. S. 256, 259;
Central Pacific R. R. v. California, 162 U. S. 91, 125;
Southern Pacific R. R. v. United States, 183 U. S. 519, 527.

(d) One who, as agent of the sovereign, makes an improvement, performs a public duty and is not answerable for consequential damages if the work be prosecuted with care and skill.

Transportation Company v. Chicago, 99 U. S. 635, 641.

So the Court of Appeals of New York has held.

Chase-Hibbard Milling Co. v. City of Elmira, 207 N. Y. 460.

In that case, the plaintiff, owner of a mill having ancient water rights in a river, sought to restrain the City of Elmira from doing certain acts which caused the water in the river to back upon the water wheels in plaintiff's plant, thereby lessening the amount of head available to the plaintiff and decreasing the water power which could be obtained therefrom. The defendant sought to justify its act because it was in the nature of a public improvement, just as petitioner here is seeking to justify its act in installing flashboards. The court held that the plaintiff was not entitled to an injunction and dismissed the complaint.

The same court has said:

> "The doctrine, however, is well established in this state, that public officers lawfully employed in making public improvements, and *corporations engaged in the performance of work of a public nature authorized by law* are not liable for consequential damages occasioned by it to others unless caused by misconduct, negligence or unskillfulness." (Italics ours.)
>
> *Atwater v. Trustees of Canandaigua,* 124 N. Y. 602, 608.
> See the same case at page 609.

The riparian rights of respondents are undoubtedly governed by state law. Petitioner does not question the right of respondents to use the water of the Mohawk as it flows past their upland nor their right to have the water leave their property at its natural level free from the effect of downstream obstructions, so far as such obstructions are caused by the acts of individuals not authorized by law; but the rule is different where one acts under the authority of law as petitioner has.

Bellinger v. N. Y. C. R. R. Co., 23 N. Y. 42;
Chase-Hibbard v. City of Elmira, (*supra*), 207 N. Y. 460;
Atwater v. Trustees of Canandaigua, (*supra*), 124 N. Y. 602.

(e) Since, under the provisions of the Federal Water Power Act, the Federal Power Commission is authorized to license certain works *in aid of navigation*, the licensees so selected by it are agencies of the United States for the governmental purposes involved.

Green Bay, &c., Co. v. Patten Paper Co., 172 U. S. 58;
Jaybird Mining Co. v. Weir, 271 U. S. 609;
Alabama Power Co. v. Gulf Power Co., 283 Federal 606, 616, 620.

(f) Respondents urged in the state courts that mere permission to erect the flashboards, as granted by the Federal Power Commission in the license and by the Secretary of War in the regulations, did not constitute petitioner as the agent of the Federal Government because the Government did not *direct* the flashboards to be installed, but simply gave petitioner the *privilege* or *option* of erecting them. The Court of Appeals sustained this argument of the respondents when it said:

> "The license granted to defendant herein does not result in any development and improvement of navigation. Its plain effect is the removal of the prohibition of Congress against the placing of an obstruction in a navigable stream; nothing more is accomplished."

R. 266; 249 N. Y. 495, 502;

Also, concurring opinion of Crane, J.

R. 267; 249 N. Y. 495, 503.

To this there are several answers:

First. The same result, as far as the effect on respondents is concerned, would have been reached if the Federal Government, itself, had installed the flashboards, using the holes that it provided for that purpose in the main spillway crest (R. 24). In fact, there is nothing to prevent the Government from rightfully erecting boards now, or from *ordering* the petitioner to erect them, since, under paragraph 7 of the license (R. 27, 239) and Section 18 of the Act (U. S. Code, Title 16, Section 811), petitioner must abide by rules and regulations of the Secretary of War in the interest of navigation, "*including the control of the level of pools.*"

Second. The permit has not been granted under Section 10 of the Act of March 3, 1899, as in *Wisconsin v. Illinois,* 278 U. S. 367 (See Point I, 8, *supra,* pages 23-24), but rather under affirmative authorization by which Congress has actively undertaken navigation improvements. The Federal Government ought to be permitted to retain the benefits which have accrued to navigation and commerce without requiring it to make appropriations and expend the public money in order to accomplish what petitioner has been willing to bring about by its use of government property and navigation facilities.

Third. It is not necessary to spell out a legal relationship of principal and agent. The meaning of a "governmental agency," referred to in cases cited above, such as *Alabama Power Co. v. Gulf Power Co.,* 283 Fed. 606; *Green Bay, &c., Co. v. Patten Paper Co.,* 172 U. S. 58; *Jaybird Mining Co. v. Weir,* 271 U. S. 609, and in other cases, such as *Choctaw & Gulf R. R. v. Harrison,* 235 U. S. 292, and *Indian, &c., Co. v. Oklahoma,* 240 U. S.

522, is that the petitioner is an *instrumentality* of the United States for the governmental purpose involved of aiding navigation and conserving the incidental water power, in the same way that a national bank is an "agency or instrumentality" of the Federal Government (*Waite v. Dowley,* 94 U. S. 527, 533; *First National Bank v. Anderson,* 269 U. S. 341, 347), and a Federal land bank (*Smith v. Kansas City Title Co.,* 255 U. S. 180).

Finally, the permission to erect flashboards is the same as permission to erect bridges over navigable waters, where the bridge or railroad companies are not *obliged* to erect them, but if they do, the companies erecting them are acting as instrumentalities of the United States and the bridges become lawful structures.

Pennsylvania v. Wheeling, &c., Bridge Co., 18 Howard 421;
Miller v. Mayor of New York, 109 U. S. 385;
Union Bridge Co. v. United States, 204 U. S. 364;
Monongahela Bridge Co. v. United States, 216 U. S. 177.

"The word 'license' means permission or authority; and a license to do any particular thing is a permission or authority to do that thing; and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize."

Gibbons v. Ogden, 9 Wheat. 1, 213.

POINT II.

There is nothing in the authority under which petitioner has acted, or in the Federal Constitution, which justifies interference by the Courts.

1. Section 10-C of the Federal Water Power Act does not give respondents a cause of action.

(a) The last sentence of this section reads as follows:

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor." (16 U. S. C., Sec. 803c).

(b) While the Court of Appeals based its decision primarily upon the ground that the license from the Federal Power Commission affords no protection to petitioner as against the claims of respondents, it stated that it had no reason to assume that the Federal Power Commission intended, by its license, to exempt petitioner from liability for damages to the rights of others (R. 267; 249 N. Y. 495, 503; concurring opinion of Cardozo, Ch. J., R. 268; 249 N. Y. 495, 503-504).

(c) This section does not create any new right or liability, but was inserted by Congress in order to protect the United States against any claim which might be made against it for damages to which a third party might be entitled under already existing law. It does not say that anyone who sustains damages may recover from the licensee; *but,* if damages be recoverable, such recovery must be had from the licensee and not from the United States. It is an immunity clause for the protection of the United States and not for the benefit of third parties.

While no suit can be maintained against the United States without its consent, nevertheless, in certain specified instances, such consent had been given by the Tucker Act and amendments thereto (Judicial Code, Sec. 24, par. 20; U. S. Code, Title 28, Sec. 41, par. 20). It was to negative liability on the part of the Government under the Tucker Act for the acts of any licensee, that Congress inserted this provision.

Moreover, claims for damages might be recovered against the petitioner if the work which it did had been performed unskillfully or in a careless and negligent manner; but, where a structure is lawfully erected under governmental authority, and with proper care and skill, damages are not recoverable because there is no trespass.

Transportation Co. v. Chicago, 99 U. S. 635, 641.

The word, "damages," as used in this section, must be taken in the legal acceptation of the term as meaning the compensation which *the law* will award for an injury done.

Scott v. Donald, 165 U. S. 58, 86.

If there be no legal liability for damages from the performance of an act, this section has no application; for it simply means that, if a right to recover damages should arise, such right must be enforced against the licensee and not against the Federal Government.

The Federal Government could have erected on the east spillway flashboards 2 feet in height; or it could have built the crest of the east spillway 2 feet higher, without liability to the respondents. It could also properly authorize the installation of such flashboards by

petitioner, declaring, however, as in Section 10-c, that for any lack of care or skill petitioner, but not the United States, shall be liable.

(d) With respect to Section 21 of the Act (U. S. Code, Title 16, Sec. 814), which gives to a licensee the power of condemnation, mentioned by the Court of Appeals in connection with Section 10-c of the Act, it is submitted that the proper construction of that section limits its application to a case where it is necessary for the licensee to *take* the property of others in the operation of the project works, and does not extend it to a case where consequential damage may result to third parties by the lawful acts of the licensee. This section, also, delegates a sovereign right to the licensee, but does not purport to create any new right for the benefit of third parties.

2. The just compensation clause of the Fifth Amendment to the Constitution of the United States does not afford a basis for the judgment herein.

The Fifth Amendment has no application unless it be assumed that petitioner has acted under the authority of, and as agent for, the Federal Government, for the Fifth Amendment is a protection only against acts of the Government or its delegate. To argue that this Amendment protects respondents is to admit that the petitioner is an agency of the Federal Government.

(a) *There has been no taking.*

A distinction must be drawn between *consequential damages* and an actual *taking* of property of a riparian owner.

Bedford v. United States, 192 U. S. 217, 224;
C. B. & Q. Ry. v. Drainage Commissioners, 200 U. S. 561, 583-584.

Incidental damages resulting from the lawful exercise of a governmental power is not a taking.

Transportation Co. v. Chicago, 99 U. S. 635, 642;
Gibson v. United States, 166 U. S. 269, 275.

In the *Gibson* case, this court said, at pages 273-274:

"In *Monongahela Navigation Co. v. Coons,* 6 Watts & Searg. 101, plaintiff's mill site was destroyed by the backing up of water by a dam built by a canal company under authority of law for the improvement of navigation, and the Supreme Court of Pennsylvania held this to be a mere consequential damage resulting from the exercise of the public right to improve navigation; that it was *damnum absque injuria;* and that such flooding and injury did not amount to a taking under the constitution.

"In the opinion of the court it was stated by Chief Justice Gibson:

" 'It cannot be said that the plaintiff's mill was taken or applied, in any legitimate sense, by the State, or by the company invested with its power; nor can it be said that he was deprived of it. In the case of the *Philadelphia and Trenton Railroad,* 6 Whart. 25, the words in the first paragraph were allowed to have their obvious and popular meaning, so as to be restrained to property taken away, and not extended to property injured by an act which did not amount to an assumption of the possession; * * *

" 'Still, it is only to a case of taking that the obligation extends; and when a corporation acts by virtue of a constitutional law, it is subject to no other responsibility for acts of consequential damage, than is specially provided for. * * *

"'It is not, therefore, enough to set before us a case of moral wrong, without showing us that we have legal power to redress it. Beyond constitutional restraint or legislative power, there is none but the legislative will, tempered by its sense of justice, which has happily been sufficient, in most cases, to protect the citizen. Compensation has been provided for every injury which could be foreseen, whether within the constitutional injunction or not, in all laws for public works by the State or a corporation; though cases of damage have occurred which could neither be anticipated nor brought within the benefit of the provision by the most strained construction. In one instance, a profitable ferry on the Susquehanna, at its confluence with the Juniata, was destroyed by the Pennsylvania canal; and, in another, an invaluable spring of water, at the margin of the river, near Selinsgrove, was drowned. These losses, like casualties in the prosecution of every public work, are accidental, but unavoidable; and they are but samples of a multitude of others.'

"Numerous subsequent cases sustain the rule thus laid down, which is, indeed, the general rule upon the subject."

That of which respondents have been deprived is subservient to navigation. Their right to use the water of the Mohawk has always been burdened with a servitude; namely that the flow of the stream might be changed by governmental power. They cannot now complain if the Government, through its lawfully constituted agency, asserts the right of utilizing its governmental easement.

Gibson v. United States, 166 U. S. 269, 276;
United States v. Chandler-Dunbar Co., 229 U. S. 53, 70.

We again quote from the *Gibson* case, at pages 271-272:

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution. *South Carolina v. Georgia,* 93 U. S. 4; *Shively v. Bowlby,* 152 U. S. 1; *Eldridge v. Trezevant,* 160 U. S. 452."

(b) *Neither have respondents been deprived of private property within the meaning of the Constitution.*

Running water in a navigable stream is not capable of private ownership.

> *United States v. Chandler-Dunbar Co.,* 229 U. S. 53, 69;
> R. 265; 249 N. Y. 495, 501.

The right of a riparian owner to use the water of a navigable stream is subject to the paramount right of the Government to make improvements for navigation purposes, and the property right of the individual is qualified to that extent. When the dominant right of the Government is exercised, the servient right must give way. Even if the riparian right is private property, it nevertheless is qualified in that it is subservient to the public requirements for navigation and commerce, and a deprivation of that right, under such circumstances, is not a "taking" of *private property,* but rather an assertion of the public servitude attached to the property right and subject to which it is held.

> *Gibson v. United States,* 166 U. S. 269, 271;
> *United States v. Chandler-Dunbar Co.,* 229 U. S. 53, 70;
> *Union Bridge Co. v. United States,* 204 U. S. 364, 392, 398, 399;

Transportation Co. v. Chicago, 99 U. S. 635;
Scranton v. Wheeler, 179 U. S. 141, 163;
Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 89;
Appleby v. City of New York, 271 U. S. 364, 393;
W. Chicago Ry. v. Chicago, 201 U. S. 506.

(c) Cases such as *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *United States v. Lynah*, 188 U. S. 445; *United States v. Cress*, 243 U. S. 316, and *Pumpelly v. Green Bay Co.*, 13 Wall. 166, are distinguishable:

The *Monongahela* case has been explained by this court as resting not on proprietary rights but on the doctrine of estoppel, because there the lock and dam had been constructed by the landowner at the instance and implied invitation of Congress. In addition, the physical structures were taken and used by the United States.

Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 89;
Greenleaf Lumber Co. v. Garrison, 237 U. S. 251, 264-266.

The *Lynah* case involved "an actual invasion and appropriation of land as distinguished from consequential damage."

Bedford v. United States, 192 U. S. 217, 225.

The *Cress* case is distinguishable in that the decision turned upon the construction of the so-called Tucker Act (Judicial Code, Sec. 24, par. 20; March 3, 1887; 24 Stat. 505, ch. 359) by which there is imposed upon the *Government* liability resting not upon tort but upon implied contract, where the riparian owner's title to what he claims is conceded.

In *United States v. Cress*, two cases were argued to-

gether, Nos. 84 and 718. In No. 84 the finding of the trial court was that, by reason of the erection of the dam plaintiff's land was *overflowed* (page 318), which was the basis of the decision in the *Pumpelly* and the *Lynah* cases.

In No. 718, while there was no actual overflowing of the upland, the damage consisted, as in the case at bar, of a loss of head to plaintiff's mill which, however, was situated on a non-navigable stream (pages 318-319). Although this court held that this was a taking of a part of the land, its decision was based upon the law of Kentucky, under which ownership of the bed of the stream is in the upland owner, and, therefore, the right to have the water flow away from the mill dam unobstructed was not a mere easement or appurtenance (page 330).

In the principal case, however, the respondents do not own the bed of the Mohawk (*Canal Appraisers v. People ex rel. Tibbits,* 17 Wend. (N. Y.) 571; *Fulton Light, Heat & Power Co. v. New York,* 200 N. Y. 400, 413; *Danes v. New York,* 219 N. Y. 67), nor have they acquired title by adverse possession (*Hinkley v. New York,* 234 N. Y. 309); hence, their right to have the water flow away from their mills unobstructed *is* a mere easement or appurtenance, subject to the right of the Government to change the flow of the stream in the interest of navigation.

That such change may be made without the necessity of responding to the upland owner in damages, as far as the Mohawk and Hudson Rivers are concerned, has been the law in New York since the decision in *Canal Appraisers v. People ex rel. Tibbits,* 17 Wend. (N. Y.) 571 (1836).

When the State of New York built the old State dam across the Hudson River at Troy, which was replaced by the present Federal dam (R. 18-19), the water of the Mohawk was backed up so as to destroy a mill site on the middle sprout of the Mohawk (*Canal Appraisers v. People ex rel. Tibbits, supra*). The highest court of New York held in that case that if, in the improvement of the navigation of a public river, the waters of a tributary stream are raised so as to destroy a valuable mill site thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the canal laws, directing compensation to be made for private property taken for a public use, his right to occupy the bed of the stream being merely *incidental, contingent and subordinate* to the paramount right of the state to improve the navigation of public rivers.

That case, particularly in point with the principal case as it arose in almost identically the same spot on the same river, has been expressly approved by the Court of Appeals of New York in *People ex rel. Loomis v. Canal Appraisers,* 33 N. Y. 461, and again in the more recent case of *Danes v. New York,* 219 N. Y. 67. The authority of the *Tibbits* case was recognized by this court in *United States v. Cress,* at page 322, and the reason therefor was stated to be because the bed of the Mohawk was the property of the state.

The cardinal distinction between the principal case and *United States v. Cress, United States v. Lynah* and *Pumpelly v. Green Bay Co.* is that, in those cases, there was a physical invasion of property by backing water upon it, rendering it unfit for use; but here there is

only, at the most, *a partial destruction of the use of the water* in which, as against the Federal right to control navigation, there is no property right. Such distinction is emphasized in the dissenting opinion of three of the justices of this court in the *Lynah* case, who rested their dissent upon the ground that the raising of the water by the Government had simply deprived the riparian owner of his ability to drain into the river (pages 481-484). That decision turned upon the construction given by this court to findings of the trial court, as to whether or not the plaintiff's lands were flooded. The majority in the *Lynah* case held that there was a physical invasion. In the view of the minority, however, there was no such physical invasion, but merely a deprivation of the ability of the upland owner to drain into the river. It is submitted by petitioner that this is exactly what has occurred in the principal case, namely: the raising of the water as it flows past respondents' lands deprives them of a certain fall in the water. In the *Lynah* case, enhanced value of the upland was obtained by draining water into the river. In this case, it is derived by diverting a part of the water of the Mohawk into a canal and then draining it back into the river.

In the complaint the theory of respondents' case is based entirely upon the allegation that the act of the petitioner "has deprived these plaintiffs of the use of a part of their said water power and has reduced the head available by upwards of two feet" (R. 5), and not upon a claim that there has been physical damage to respondents' property caused by any *overflowing* of the upland, as existed in the *Pumpelly, Cress* and *Lynah* cases.

If the Federal government, by raising the elevation of the dam, had caused the water of the Mohawk to flood respondents' lands (as happened in the *Lynah* case), there can be no question but that the Government would have to respond in damages, as that would constitute an actual *taking* of property; but where the increase in elevation at respondents' tailraces does not result in overflowing the upland, but merely decreases the height of the fall of the water which respondents had previously enjoyed, there is no flooding of the upland and, consequently, no *taking* for which the petitioner must respond in damages.

It is true that the trial court in this case found that the maintenance of the flashboards caused a backing of water upon the lands, buildings and hydraulic plants of the respondents (R. 20). Such finding, however, is not supported by the evidence, as the only proof on this point is given on pages 71 and 72 of the record as follows:

"Q. What do you find to be the effect of raising the elevation of the water at Troy with reference to the elevation of the water at plaintiffs' plants?

"A. Any raising of the water in elevation of the water at the Troy dam results in a corresponding rise of the water surface at the plants of the plaintiffs.

"Q. What is the effect on the plaintiffs' hydraulic plants and power if the water at its tailraces or plant is raised?

"A. Any increase in the height of the water or any raising of the water surface in the tailrace or tailraces of the plaintiffs diminishes the effective head operating on the turbines of the plaintiffs. That is, the column of water which is forcing their water wheels to turn is of a smaller height.

"Q. And what effect does that have on the power available?

"A. The decrease in the effective head decreases the amount of power available on the turbine shafts in direct proportion.

"Q. Then tell us what is the effect on the power of the plaintiffs in their plants which you have described resulting from an increase in the elevation of the water at the Troy dam?

"A. Any increase in the elevation of the water at the Troy dam causes a reduction in the available power of the wheels of the plaintiffs.

"Q. Tell us whether or not the placing of these flashboards on the crest of the Troy dam does increase the elevation of the water at that point?

"A. Yes, it does."

From which it is apparent that the only result of flashboards is to raise the elevation of water at respondents' tailraces so as to decrease the head. There is absolutely no proof that the water is caused to overflow their lands or buildings except in so far as respondents have subjected their buildings to it by constructing them in the river, which is admitted by their counsel, at the top of page 7 of his brief in opposition to granting the writ of certiorari, when he says: *"The mills are located in part in the river itself."*

Just as this court felt constrained to construe the findings of the trial court in the *Lynah* case, so it will examine the record here, in order to ascertain whether or not a Federal right, set up by petitioner, has been denied by the state courts because of an erroneous finding of fact. Such is the power of this court (Point I, 7, c. *supra,* pages 22-23).

After such examination of the record, as quoted above, it will be seen that there is absolutely no basis for a finding that respondents' lands have been flooded. The river has simply been raised in its natural channel;

it has not been made to overflow its banks. Consequently, respondents are not in a position to complain, for two reasons: First, their lands have not been flooded; second, the damage has been sustained because they have seen fit to erect their buildings and hydraulic equipment in the river, the bed of which is owned by the State of New York (*Canal Appraisers v. People ex rel. Tibbits,* 17 Wend. (N. Y.) 571; *Fulton L. H. & P. Co. v. New York,* 200 N. Y. 400; *Danes v. New York,* 219 N. Y. 67; *United States v. Cress,* 243 U. S. 316, 322), and control over the navigable capacity of which is subject to Congress and such agencies as it may deem proper to employ or authorize for that purpose.

(d) The Mohawk River flows into the Hudson through various branches or sprouts (R. 50). Suppose Congress had determined to close the fourth sprout of the Mohawk, upon which respondents' plants are located, by diverting all the water therein into another sprout for purposes of navigation. Respondents would then be deprived of their use of the water, but that would not be a taking requiring compensation. That is exactly what occurred in *South Carolina v. Georgia,* 93 U. S. 4. Neither would respondents be entitled to compensation if Congress, for purposes of navigation, compelled them to remove their dam in the Mohawk, without which they could not develop power (*United States v. Chandler-Dunbar Co., supra,* and various bridge cases). A riparian owner has a qualified right to use the water as it flows past his upland and, also, he has a qualified right of access to deep water, but, if the latter can be taken away without compensation, as held by this court in *Gibson v. United States* and *Scranton v. Wheeler,* certainly the former can be taken away also, without violating the Fifth Amendment; for both are not absolute

property rights, but each is burdened with the servitude of Federal control over navigation and subject to the risk that Congress may make changes in the interest of navigation which will destroy their use.

> "The investment of property in the canal and the accompanying works took the risk that Congress might render it valueless by the exercise of paramount powers."
>
> *Sanitary District v. United States,* 266 U. S. 405, 431.

POINT III.

The judgment under review should be reversed and this cause should be remanded for further proceedings not inconsistent with the decision of this Court.

All of which is respectfully submitted.

Dated, October 1, 1929.

ROBERT E. WHALEN,
CHARLES E. NICHOLS, JR.,
CLIFFORD B. LONGLEY,
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INDEX TO BRIEF

Subject Index

	PAGE
Opinions Below	5
Prior Proceedings	5
Statement of Case	6
Lack of Merit in Petitioner's Case	9
Points:	
I. Plaintiffs' ownership of water power and riparian rights is conceded	11
II. Plaintiffs have the right to have the water leave their property at its natural level	14
III. The backing of water upon the water power, lands and buildings of plaintiffs is a continuing trespass.	15
IV. Negligence or absence of negligence is immaterial in an action for trespass	20
V. The flashboards were installed for the private power purposes of the defendant	21
VI. There is no necessity for the use of these flashboards for navigation purposes	26
VII. The mere permission from the Secretary of War does not create an agency nor invest the defendant with any immunity	28
VIII. The Federal Water Power Act expressly provides that compensation must be made for the property of others used or damaged by a licensee	35
IX. The argument that the defendant has purchased from the Federal government the right to maintain these flashboards is untenable	41
X. The Federal government itself could not take plaintiffs' water power without making compensation therefor as required by the Constitution	41
XI. Conclusion	54

TABLE OF CASES CITED

	PAGE
American Woolen Co. v. State, 195 App. Div., (N. Y.), 698. . . . .14, 46,	47
Amsterdam Knitting Co. v. Dean, 162 N. Y., 278.....18,	19
Ackerman v. True, 175 N. Y., 353.....	19
Alabama Power Co. v. Gulf Power Co., 283 Fed., 606.....	31
Appleby v. City of New York, 271 U. S., 364.....	50
Atwater v. Trustees of Canadaigua, 124 N. Y., 602.....	57
Brown v. Bowen, 30 N. Y., 519.....14,	15
Brown v. Ontario Talc Co., 81 App. Div., (N. Y.), 273...	18
Brown-Brandt Realty Co. v. Saks, 126 Misc., (N. Y.), 336.	30
Bellinger v. New York Central R. R., 23 N. Y., 42.....31,	53
Boyd v. United States, 115 U. S., 616.....	44
Bedford v. United States, 166 U. S., 269.....	48
Bedford v. United States, 192 U. S., 217.....	52
Burt Olney Canning Co. v. State, 230 N. Y., 351.....	53
Burnmaster v. State, 186 App. Div., (N. Y.), 131.....	53
Corning v. Troy Iron & Iron Nail Factory, 40 N.Y., 191..15,	16
Coloney v. Farrow, 91 Hun, (N. Y.), 82.....	16
Coatsworth v. Lehigh Valley R. Co., 156 N. Y., 451....19,	20
Cobb v. Commissioners of Lincoln Park, 202 Ill., 427.....	29
Commr's of Canal Fund v. Kempshall, 26 Wend., (N. Y.), 414. 46,	50
Canal Appraisers v. Tibbits, 17 Wend., (N. Y.), 571.....	49
Chase-Hibbard M. Co. v. Elmira, 207 N. Y., 460.....	53
Central Pacific R. R. v. California, 162 U. S., 91.....	53
Clallam County v. United States, 263 U. S., 341.....	54
Empire Leasing Co. v. Mecca Realty Co., 174 App. Div., (N. Y.), 433.	19
Ex parte Jennings, 6 Cowen, (N. Y.), 518.....	46
Economy Light Co. v. United States, 256 U. S., 113.....	51
Frisbie-Stansfield Knitting Co. v. State of New York, 189 App. Div., (N. Y.), 341.....	54
Gilzinger v. Saugerties Water Co., 66 Hun, (N. Y.), 173, 142 N. Y., 632. 15,	18

Table of Cases Cited—Continued

	PAGE
Garvey v. Long Island R. R., 159 N. Y., 323.....19,	20
Green Bay, etc. Co. v. Patten Paper Co., 172 U. S., 58.....	32
Greenleaf Lumber Co. v. Garrison, 237 U. S., 251.....	47
Hall v. Augsbury, 46 N. Y., 622.....14,	15
Hammond v. Fuller, 1 Paige Ch., (N. Y.), 197.....	16
Hinkley v. State of New York, 234 N. Y., 309.....	49
Jaybird Mining Co. v. Weir, 271 U. S., 609.....	32
Kiff v. Youmans, 86 N. Y., 324.....	53
Laroy v. Andstein Building Corp., 209 App. Div. (N. Y.), 895.....	19
Lewis Blue Point Oyster Co. v. Briggs, 229 U. S., 82.....	31
Lehigh Valley R. R. v. Canal Board, 146 App. Div. (N. Y.), 161.....	40
Lehigh Valley R. R. v. Canal Board, 204 N. Y., 471....37,	40
Lorman v. Benson, 8 Mich., 18, 26.....	51
Mudge v. Salisbury, 110 N. Y., 413.....16,	17
Murphy v. Commissioners of Emigration, 28 N. Y., 134...	30
Miller v. Mayor of New York, 109 U. S., 385.....	32
Matter of State Reservation, 37 Hun (N. Y.), 537.....	42
Monongahela Navigation Co. v. United States, 148 U. S., 312.....	43
Monongahela Navigation Co. v. United States, 216 U. S., 177.....	47
Moore v. Sanborne, 2 Mich., 519, 525.....	51
McKee v. Delaware & Hudson Co., 125 N. Y., 353.....16,	21
Neveigh v. International Paper Co., 125 App. Div. (N. Y.), 293.....	15
Oswego & Syracuse R. R. Co. v. State, 226 N. Y., 351....37	40
Pixley v. Clark, 35 N. Y., 520.....14,	20
Pumpelly v. Green Bay Co., 80 U. S. (30 Wall.), 166.....	29
Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U. S., 421.....32,	33
People v. Hudson River Conn. R. R. Co., 228 N. Y., 203.....33,	34
Philadelphia Co. v. Stimson, 223 U. S., 605.....	48

Table of Cases Cited—Concluded

PAGE

Rothery v. N. Y. Rubber Co., 24 Hun (N. Y.), 172; 90 N. Y., 30.....14, 15, 17
Schwarzenbach v. El. Water Power Co., 101 App. Div. (N. Y.), 345; 184 N. Y., 546..... 15
Schwarzenbach v. Oneonta Light & P. Co., 207 N. Y., 671; 144 App. Div., 884..... 18
Silver Beach Realty Corp. v. Geelan, 122 Misc. (N. Y.), 645. 19
Sammons v. City of Gloversville, 175 N. Y., 346.....30, 31
South Carolina v. Georgia, 93 U. S., 4..... 33
Sewell v. Arundel Corp., 20 Fed. (2d), 503.....33, 34
Scranton v. Wheeler, 179 U. S., 141..... 48
Scott v. Donald, 165 U. S., 58..... 53
Southern Pacific Railroad v. United States, 183 U. S., 519.. 53
The West Point Iron Co. v. Reymert, 45 N. Y., 703..... 17
Transportation Co. v. Chicago, 99 U. S., 635..... 48
Tyler v. People, 8 Mich., 320, 332..... 51
The Montello, 87 U. S. (20 Wall.), 430..... 51
The Daniel Ball, 77 U. S. (10 Wall.), 557..... 51
United P. B. Co. v. Iroquois P. & P. Co., 226 N. Y., 44-47. . .....14, 47
United States v. Cress, 243 U. S., 316.....40, 42, 44, 47
United States v. Lynah, 188 U. S., 445..... 46
United States v. Rio Grande Dam & Irri. Co., 174 U. S., 690. 47
United States v. Chandler-Dunbar Co., 229 U. S., 53..50, 51, 52
Warren v. City of Gloversville, 81 App. Div. (N. Y.), 291.. 17
Whalen v. Union Bag & Paper Co., 208 N. Y., 1..... 18
Williams v. N. Y. C. R. R., 16 N. Y., 97..... 19
Wisconsin v. Duluth, 96 U. S., 379..... 33
Waterloo Woolen M. Co. v. Shannahan, 128 N. Y., 345.... 53
Westfall v. United States, 274 U. S., 256..... 54

Table of Statutes Cited

Barge Canal Act, Chap. 147, Laws 1903 (New York)..... 27
Constitution, Fifth Amendment..... 43
Water Power Act (U. S.) of 1920.....35, 36, 37, 39

Supreme Court of the United States
OCTOBER TERM, 1928.

No. 752

HENRY FORD & SON, INC., Petitioner,

against

LITTLE FALLS FIBRE COMPANY, ASBESTOS SPINNING AND WEAVING CORPORATION, And HARRY A. FURMAN, CHARLES H. BURROWS, And CLARENCE T. WRIGHT, as Receivers of MOHAWK PAPER MAKERS, INC., Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW.

In addition to the opinions referred to in petitioner's brief, there is an opinion on the motion for an injunction *pendente lite* reported at 126 Misc. (N. Y.), 126, which is not printed in the record.

PRIOR PROCEEDINGS.

This is an action for an injunction restraining the defendant from maintaining flashboards on the Federal dam in the Hudson river at Troy.

The flashboards were attached to the dam on June 16, 1925. The summons and complaint were served July 7, 1925, together with a notice of motion for a temporary injunction.

The Supreme Court granted an injunction *pendente lite,* the opinion being reported in 126 Misc. (N. Y.), 126.

The main issue in the case, the right of a plaintiff to a permanent injunction, was tried at the May, 1926, Term, of the Supreme Court in Saratoga County and a permanent injunction granted. The opinion of the Court is printed at pages 28 *et seq.* of the record.

The plaintiffs also claimed damages for the maintenance of these flashboards during the period from June, 1925, to October, 1925. It was stipulated between the parties (fols. 146-50) that the damages of the Mohawk Paper Makers, Inc., were $5,000 during this period and the damages of the Asbestos Spinning and Weaving Corporation $210. No damages were fixed for the Little Falls Fibre Company for the reason that, during the period in question, it was making alterations in its mill which was, therefore, not in operation.

On appeal to the Appellate Division of the Supreme Court the judgment was affirmed, the opinion appearing at pages 319-324 of the record.

The petitioner then appealed to the Court of Appeals which affirmed the decision of the Appellate Division, the opinions appearing at pages 330-339 of the record.

Statement of Case.

The plaintiffs are the owners of manufacturing plants located in the Town of Waterford on the north bank of the northernmost branch or sprout of the Mohawk river, about a half mile westerly of its confluence with the Hudson. These plants are operated by water power obtained from the river by means of what is known as the Kings Canal development. This development was made in or about the year 1828, just a century ago. It consists of a dam extending across that branch of the Mohawk by means of which water is diverted into a power canal running along the north bank of the river. The plaintiffs' mills are located between this canal and the river and the water is drawn from the canal through the plaintiffs' waterwheels and is then discharged into

the river beneath the mills. The mills are located in part in the river itself.

The plaintiffs and their predecessors in title have been in ownership, possession, and enjoyment of this water power for a century. The power is essential to the operation of the mills and they are substantial industries, representing large investments of money.

In 1823 the State constructed across the Hudson river at Troy, a dam with a crest elevation of 13.2 feet above sea level Barge Canal Datum (hereafter abbreviated to B. C. D.). This dam was located about three miles downstream from the plaintiffs' plants. It had a lock in its easterly end for the passage of boats.

In 1915 the Federal Government constructed a new dam and lock at Troy to replace the old State dam, locating it about 1,000 feet upstream above the site of the latter dam. This dam also has a lock in its easterly end.

The new dam was erected in two sections, the one extending from the easterly bank at right angles thereto and the other section continuing diagonally downstream until it reaches the westerly bank of the river. The easterly section was built to a crest elevation of 15.2 B. C. D. (2 feet higher than the old State dam) and the westerly section to a crest elevation of 17.2 B. C. D. (4 feet higher than the old State dam).

No flashboards were used on the Troy dam from 1915, when it was first put in operation, until June, 1925, when flashboards were attached by the defendant. (Fol. 557.)

In 1921 the defendant procured a license (fols. 846-877) from the Federal Power Commission, under the Federal Water Power Act of 1920, for the construction of an hydro-electric power plant at the westerly end of this Troy dam and, since the powerhouse was completed in April, 1923, the defendant has been operating this powerhouse, drawing its water from the pool formed by that dam.

The defendant is not a public service corporation but is a private corporation, a subsidiary of the Ford Motor Company, and all the power developed in this power station is transmitted to and utilized by, the Ford Motor Company in its plant at Green Island, N. Y., for private manufacturing purposes. (Fol. 433.)

It is probable that the pool formed by the old State dam did not reach as far as the plaintiffs' plants, but there is no question that the pool of the new Federal dam did reach to the plaintiffs' tail races so that we have one pool of water extending from the dam up to plaintiffs' plants. Any increase in the elevation of the water at the Troy dam results in a corresponding increase at the plaintiffs' plants.

On June 16th, 1925, the defendant attached two feet of flashboards to the easterly section of the Federal dam, thereby raising the crest of that section from 15.2 B. C. D. to 17.2 B. C. D. The immediate result was, of course, to back two feet of water on the plaintiffs' plants. The official records of the water elevations for that week show the results more clearly than any argument can. They were as follows:

Day.	Water Elevation.
June 13, 1925	16.2 B. C. D.
" 14, "	16.4
" 15, "	15.3
" 16, "	15.8
" 17, "	18.2
" 18, "	18.1

The water on June 13th and 14th was at its normal elevation; on the 15th and 16th the water was drawn down so that the men could go out on the dam to attach the flashboards; and on the 17th and 18th the flashboards were in operation.

The maximum gross head available to the plaintiffs is only 14.4 feet. Thus the loss of two feet of head is a very serious and substantial loss.

That the damage is very substantial is evident from the fact that the defendant has stipulated the damages of two of the plaintiffs to be $5,210 for a period of *only four months* from June to October, 1925.

It should be noted that the water is backed upon the buildings of plaintiffs as well as into their tailraces. (Decision, fols. 86 and 88).

The findings of the Trial Court that these flashboards deprived the respondents of a portion of their water power are ample (fols. 84-88).

As a result of the placing these flashboards on the dam, the defendant has not only reduced the power available to the plaintiffs, but it has taken that same power to itself. What it actually did was to steal two feet of head from the plaintiffs at Waterford and convert the same head to its own use at Troy. By this means it increased very substantially the power of its own plant as its manager admits. (Fol. 433.)

After the plaintiffs and their predecessors in title have been in possession of this property for nearly 100 years, the defendant comes into the situation in 1925, and boldly seizes a portion of it for its own purposes.

If the defendant desires more power for the manufacture of automobiles, it should be required to buy and pay for that power like any one else and should not be permitted to take it from others in this outrageous manner.

The Petitioner's Case is Entirely Without Merit and this Expensive Litigation Should Not be Prolonged.

The situation presented by this case is a simple one. The petitioner, desiring to secure more water power for its private manufacturing business, seeks to obtain this by stealing it from the respondents by the simple operation of putting two feet of flashboards on the Troy dam whereby two feet of head is taken from the respondents at Waterford and transferred to the petitioner at Troy.

This procedure is unjust, unconscionable, and dishonest and it is inconceivable that it is sanctioned by the law of the land.

The plea of the defendant in regard to the improvement of navigation and the broad powers of the Federal government is the most transparent subterfuge. There is nothing involved here except the attempt of one private corporation to take water power from another without paying for it.

There is not a shred of evidence in the record that these flashboards were intended to improve navigation or that they had any connection whatever with navigation. They were put on for private power purposes and the interests of navigation were not heard of until after this law suit was commenced.

Neither Congress nor any Federal official ever intended to give this petitioner the special "privilege" of converting the respondents' water power to its own use without compensation. Such an intention is merely a creature of petitioner's imagination.

This litigation was forced on the respondents by the arbitrary act of the petitioner in installing these flashboards without warning or notice in June, 1925. *The litigation has already extended over a period of nearly four years. It is needless to say that it has been an expensive one for the respondents and there is no way provided whereby they can recover any substantial part of the expense to which they have been put.* (R., fols. 196-202 and 929.)

It is respectfully submitted that this litigation should not be further protracted by the granting of a writ of certiorari. The respondents have already been put to sufficient expense by the unconscionable acts and claims of the petitioner.

Some of the opinions in the courts below cover somewhat broader ground than is required by the facts of the case. The brief opinion of Judge Crane in the Court of Appeals (R. 335) is sufficient to dispose of it.

The following is our argument as submitted to the Court of Appeals:

POINT I.

Plaintiff's ownership of the water power and riparian rights as well as of the dam, hydraulic canal and buildings, is stipulated and conceded.

The defendant stipulated and conceded at the trial that the plaintiffs were the owners of the waterpower at the site of their development; that the plaintiffs and their predecessors in title had owned and possessed this water power and the riparian rights in, on, under, and along the Mohawk river at the place in question for a century preceding.

The stipulation between the parties (Plffs'. Ex. 1) reads in part as follow (fols. 831-2):

> "11. The dam and hydraulic canal of the plaintiffs referred to in the complaint and known as King's dam and King's canal were constructed in or about the year 1828 by the predecessors in title of the plaintiffs.
>
> 12. Said dam and canal and the land adjoining same upon which are located the mills of the plaintiffs, together with water power made available by said dam and canal, have been owned, possessed, used, occupied, operated and maintained by the plaintiffs and their predecessors in title continuously since in or about the year 1828."

The Court made findings in the same terms (fols. 77-78) and no exception has been taken by defendant to those findings. (Fol. 135).

At the request of the *defendant,* the Trial Court found (fols. 97-99):

> "2. Plaintiffs are the owners and in possession of certain land, riparian and water rights and water-power rights, in, on, under and along the so-called north or fourth branch of the Mohawk river, west of the confluence thereof with the Hudson river, in the town of Waterford, County of Sara-

toga and State of New York, which constitute a site for the development of water power.

3. At said site for about one hundred years last past, plaintiffs and their respective predecessors in title have jointly held, owned, maintained and operated a dam across said north or fourth branch of the Mohawk river and a power canal leading from the pool formed by said dam for the purpose of developing and utilizing said water power, which dam and canal, commonly known as King's dam and King's canal, respectively, were constructed in or about the year 1828 by the predecessors in title of plaintiffs.

4. Plaintiffs are now jointly maintaining and operating said dam and power canal and severally developing and utilizing said water power by means of hydraulic works upon the parcels of land severally owned and possessed by plaintiffs, upon which are also located plants, consisting of mills and factories, severally owned and possessed by plaintiffs and operated by means of said water power."

Thus there is not involved in this case any question as to the ownership of the bed of the Mohawk river or of the riparian rights therein.

Moreover, the State of New York is not a party to this action and any interest which it might claim in the river bed is in no way involved.

In a recent case regarding a water power on the Hudson river above Schuylerville, the Court of Appeals defined the rights of the riparian owner in the water power of that river as follows:

"The rule of law is familiar that each owner of land contiguous to a natural watercourse has a right, as owner of such land and as naturally connected with and incident to it, *to the natural flow of the stream along his land and its descent, and all the force to be derived therefrom,* for any domestic or hydraulic purpose to which he may decide to apply it. He may, by means of a ditch or conduit, with-

draw water from the stream and cause it to flow unnaturally through his land for agricultural, industrial or other purpose, provided he causes it, in its substantial volume, to return upon his land to the stream. In order that he may enjoy those rights every owner is bound to use the water reasonably as it flows, so as not to injure the equal rights of all the owners. Whether or not a use or detention of the water is reasonable must be determined by the extent and capacity of the stream, the uses to which it is and has been put, and the rights that other owners on the stream have. The essential question in each particular case is what is reasonable under the conditions and circumstances there presented. Those are riparian rights, are natural and inherent, and a part of the estate of each riparian owner. (*Pierson* v. *Speyer,* 178 N. Y. 270; *Clinton* v. *Myers,* 46 N. Y. 511; *Bullard* v. *Saratoga Victory Manufacturing Co.,* 77 N. Y. 525.)"

* * * * * * * *

"The right to the use of the water of a flowing stream, navigable or unnavigable, arises by mere operation of law as incident to the ownership of the bank and is a part of the estate of its owner. (*Lyon* v. *Fishmongers Company,* L. R. 1 App. Cas. 662; *Sisson* v. *Cummings,* 35 Hun, 22; *Webb* v. *Portland Manufacturing Co.,* 3 Sumn. 189; *Danes* v. *State of N. Y.,* 219 N. Y. 67; *Duckworth* v. *Watsonville W. & L. Co.,* 158 Cal. 206, 216; *Washington Ice Co.* v. *Shortall,* 101 Ill. 46.) It is a valuable property right which can be severed from the riparian land by grant, condemnation, relinquishment or prescription. Thomason and Dix as owners of the single tract might release it or grant it to another or restrict or reserve it as owners of the single tract to specified uses or places. (*Matter of N. Y. C. & H. R. R. R. Co.,* 77 N. Y. 248; *Trustees of Town of Brookhaven* v. *Smith,* 188 N. Y. 74; *Barnes* v. *Midland R. R.*

Terminal Co., 193 N. Y. 378; *Sage* v. *Mayor, etc., of N. Y.*, 154 N. Y. 61.)"

United P. B. Co. v. *Iroquois P. & P. Co.*, 226 N. Y., pp. 44-47.

POINT II.

The plaintiffs have the right to have the water leave their property at its natural level free from the effect of downstream obstructions.

Under principles as old as the English common law plaintiffs are entitled to have the water at their property free from any interference or backing caused by obstructions erected downstream. "*Aqua currit et debet currere ut currere solebat*" (*Pixley* v. *Clark*, 35 *N. Y.*, 520 *at page* 524). "Water runs and it ought to run as it has been accustomed to run."

The absolute right to have the waters continue in their natural condition has been established beyond any question.

Hall v. *Augsbury*, 46 N. Y., 622 at 625-6.

Brown v. *Bowen*, 30 N. Y., 519 at 537-9.

Rothery v. *N. Y. Rubber Co.*, 24 Hun, 172; 90 N. Y., 30.

American Woolen Co. v. *State*, 195 App. Div., 698 at page 704.

United P. B. Co. v. *Iroquois P. P. Co., supra.*

"Here the defendants, and those under whom they claim, had no right to raise the water by flash boards, or otherwise, on the plaintiff's premises, higher than it naturally ran, even though such increased height did not back water upon plaintiff's mill wheels, so as materially to obstruct their action.

The plaintiffs had a right to have the water run as it had been accustomed to run, in height and in speed, through their land."

Hall v. *Augsbury,* supra.

"The maxim *sic utere tuo, etc.,* applies as well to setting back the water of a watercourse above the owner's land in the natural channel of the stream, as it does to an actual overflow of land. * * * No single proprietor without consent, has a right to make use of the flow in such manner as will be to the prejudice of any other, and that he has no more power to apply it to a purpose which occasions a return of the water on the land above, than he has to cause a diminution of the quantity below. *He cannot alter the level of the water either where it enters or where it leaves his property.*"

Brown v. *Bowen,* supra.

POINT III.

The backing of water upon the water power or lands or buildings of plaintiffs is an invasion of real property rights and constitutes a continuing trespass against which the injured party is entitled to injunctive relief.

Corning v. *Troy Iron & Nail Factory,* 40 N. Y., 191.

Rothery v. *N. Y. Rubber Co.,* 90 N. Y., 30.

Neveigh v. *International Paper Co.,* 125 App. Div., 293.

Schwarzenbach v. *El. Water Power Co.,* 101 App. Div., 345; Affd., 184 N. Y., 546.

Gilzinger v. *Saugerties Water Co.,* 66 Hun, 173; Affd., on op. below, 142 N. Y., 632.

Hammond v. *Fuller,* 1 Paige Ch., 197.

Coloney v. *Farrow,* 91 Hun, 82.

Mudge v. *Salisbury,* 110 N. Y., 413.

McKee v. *Delaware & Hudson Co.,* 125 N. Y., 353.

"Upon established principles, this is a proper case of equity jurisdiction. First, upon the ground that the remedy at law is inadequate. The plaintiffs are entitled to the flow of the stream, in its natural channel. Legal remedies cannot restore it to them and secure them in the enjoyment of it. Hence the duty of a court of equity to interpose for the accomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of the plaintiffs to the equitable relief sought, is established by authority as well as principle. (*Webb* v. *The Portland Manufacturing Co.,* 3 *Sumner,* 190 and cases cited; *Tyler* v. *Wilkinson,* 4 Mason, 400; *Townsend* v. *McDonald,* 2 Kernan, 381; Story's Equity Sections 901, 926-7; Angell on Water Courses, Sections 449-50.)"

Corning v. *Troy Iron and Nail Factory,* 40 N. Y., 191, at pages 206-7.

"It having been determined that the erection and maintenance of the dam at its present height was unauthorized, and an invasion of the plaintiffs' rights, the court was authorized to render a mandatory judgment, requiring the defendants

to lower the dam. (*Hammond* v. *Fuller*, 1 *Paige*, 197; *Corning* v. *The Troy Iron & Nail Factory*, 40 N. Y. 192.)"

Rothery et al v. *New York Rubber Co.*, 90 N. Y., 30, at page 32.

"Equity will interpose by injunction to prevent an encroachment upon the rights of a proprietor in a running stream, and will exercise jurisdiction to compel a restoration of running water to its natural channel."

The West Point Iron Co. v. *Reymert*, 45 N. Y., 703, at pages 705-6.

"Where wrongful interference with the waters of a stream causes substantial injury, an injunction to the person so substantially injured *is a matter of right.*"

Warren v. *City of Gloversville*, 81 App. Div., 291, at page 293.

"Resort to equity by the plaintiffs was proper in this case. The jurisdiction of courts of equity and their power to grant relief cannot be doubted. The avoidance of a multiplicity of actions and the inadequacy of legal remedies to prevent the defendants from taking away the water to the detriment of plaintiffs' prior rights thereto, and to secure to plaintiffs the continuous enjoyment by them of those superior rights, are deemed sufficient grounds for the interposition of a court of equity. (*Olmsted* v. *Loomis*, 9 N. Y. 423; *Corning* v. *Troy Iron Factory*, 40 id. 191.)"

Mudge et al v. *Salisbury et al*, 110 N. Y., 413, at page 417.

Where, as in the present case, there is a continuing trespass on the lands or water rights of the plaintiff, he is entitled to injunctive relief *as a matter of right.* In the equitable protection of real property rights in water there is no so-called "balancing of

equities." The plaintiff is entitled to an injunction even though he show only nominal damages or no actual damages at all.

Whalen v. *Union Bag & Paper Co.*, 208 N. Y., 1.

Amsterdam Knitting Co. v. *Dean*, 162 N. Y., 278.

Schwarzenbach v. *Oneonta Light & Power Co.*, 207 N. Y., 671, modifying 144 App. Div., 884.

Brown v. *Ontario Talc Co.*, 81 App. Div., 273.

Gilzinger v. *Saugerties Water Co.*, 66 Hun, 173; Affd., on op. below 142 N. Y., 632.

"Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich. It is always to be remembered in such cases that 'denying the injunction puts the hardship on the party in whose favor the legal right exists instead of on the wrongdoer.' (Pomeroy's Eq. Juris. vol. 5, Sec. 530.) In speaking of the injustice which sometimes results from the balancing of injuries between parties, the learned author from whom we have just quoted, sums up the discussion by saying: 'The weight of authority is against allowing a balancing of injury as a means of determining the propriety of issuing an injunction.'"

Whalen v. *Union Bag & Paper Co.*, supra.

"It seems to be well settled that in such cases, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction, *though no actual damage is shown or found.* (*Smith* v.

City of Rochester, 104 N. Y., 674; *Webb* v. *Portland Mfg. Co.,* 3 Sum. 189; *Corning* v. *Troy Iron and Nail Factory,* 40 N. Y. 191; *Gould on Waters, Sec.* 13; *Angell on Watercourses,* Sec. 449.)"

Amsterdam Knitting Co. v. *Dean,* supra.

A continuing trespass has been enjoined in the case of numerous other forms of interference with real property and the rights appurtenant thereto.

Ackerman v. *True,* 175 N. Y., 353.

Garvey v. *Long Island R. R.,* 159 N. Y., 323.

Williams v. *N. Y. C. R. R.,* 16 N. Y., 97.

Coatsworth v. *Lehigh Valley R. Co.,* 156 N. Y., 451.

Silver Beach Realty Corp. v. *Geelan,* 122 Misc., 645.

Laroy v. *Andstein Building Corp.,* 209 App. Div., 895.

Empire Leasing Co. v. *Mecca Realty Co.,* 174 App. Div., 433.

"The answer of the defendant seems to be that as the land is rough and unimproved, plaintiff really suffers no damage, and that he can be compensated in an action at law. This contention is entirely beside the legal question involved here, which is the right of plaintiff to use and enjoy his land without the unlawful trespass of the defendant, which the record shows has been committed without any regard to plaintiff's rights."

Laroy v. *Andstein Building Corp.,* 209 App. Div., 895.

"If the appellant is a continuous trespasser upon the plaintiff's rights of property, he should not be compelled to bring successive suits for each day's injury."

Ackerman v. *True,* 175 N. Y., 346, at page 353.

"Where trespasses upon land are continuous, the owner has a right to invoke the power of a court of equity to restrain such trespasses, and thus prevent a multiplicity of suits. That doctrine is fully sustained by the cases cited."

Coatsworth v. *Lehigh Valley R. Co.*, 156 N. Y., 451, at pages 457-8.

"A court of equity has jurisdiction of an action to restrain the commission of a continuing trespass, because the injunction prevents a multiplicity of actions at law, which is a grievance to the parties and a burden upon the public. (*Corning* v. *Troy Iron & Nail Factory*, 40 N. Y. 191; *Williams* v. *N. Y. C. R. R. Co.*, 16 N. Y. 97, 111; *Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y., 423."

Garvey v. *Long Island R. R. Co.*, 159 N. Y., 323, at page 332.

POINT IV.

Negligence or absence of negligence on the part of the defendant is immaterial in an action founded upon trespass.

The defendant pleads in its answer, paragraph 7, that it "has proceeded skillfully in the exercise of reasonable care and with due regard for the rights of others."

The defendant's counsel is confounding an action for negligence with an action for trespass. We complain of an intentional, deliberate and continuing occupation and seizure of a part of our property and negligence or lack of skill is in no way involved.

This argument, irrelevant as it is, has been heretofore disposed of by the Court of Appeals. In *Pixley* v. *Clark*, 35 N. Y., 520 at page 523 the Court said:

"Was it ever held or pretended that you might build a dam, and flow another's land provided you were guilty of no want of care or skill in its construction? In fact, the better dam you make—the more skillful and perfect its construction—the more water you restrain and throw back—the greater the damage to the adjoining landowner."

That Court reached the same conclusion in *McKee* v. *Delaware & Hudson Co.*, 125 N. Y., 353.

POINT V.

These flashboards were installed by the defendant for its own private purposes and the plea that it is acting as the agent of the Federal government in the improvement of navigation for the benefit of interstate and foreign commerce is a mere subterfuge.

The findings of the Trial Court on this point (fols. 81-83) have been approved by the Appellate Division (fols. 919-20 and 928), and are amply supported by the evidence.

The case is an attempt to take plaintiffs' property against their will for a *private* purpose and *without compensation.*

That the defendant's argument about navigation, about interstate and foreign commerce, and about the power of the Federal government to improve navigation for such interstate and foreign commerce is mere subterfuge, is perfectly obvious. Defendant is not interested in navigation nor in philanthropically expending its money for the improvement of navigation for others. It is engaged in a private enterprise, the manufacture of automobiles, and its sole and only purpose is to manufacture them at the greatest profit to itself.

In connection with the operation of its automobile manufacturing plant, it desired to obtain more power from its power

plant and a convenient way of doing this was to get two feet more of head by putting flashboards on the dam.

The dam is the property of the Federal government. Necessarily, when the defendant wished to attach any fixtures to this dam, its first step was to get permission from its *owner.*

When the Federal government granted this request it gave merely a permission. That permission meant that, so far as the government was concerned, it had no objection to the Ford Company attaching flashboards to Federal government property, to wit, the dam.

There is not a scintilla of evidence that the Federal government determined that these flashboards were necessary for the improvement of navigation or that that matter was even considered. The most that it can be said to have determined was that it had no objection to these flashboards being placed on its dam and that they would *not interfere* with the navigation of the river. There is no evidence that the government intended to go any further than this.

The government did not *direct* that the flashboards should be installed. It did not contract for their erection. It simply gave the defendant the privilege or option of putting them on the Federal dam if and when it pleased the defendant to put them on.

On September 22, 1924, the defendant wrote to the United States Engineer's Office at Albany the following letter (Plffs' Ex. 17, fol. 841):

"September 22, 1924.

United States Engineer Office,
Room 401, 467 Broadway,
Albany, New York.

GENTLEMEN:

We have the honor to request that we be permitted to install flashboards on the Troy Dam *in connection with the operation of our power house.*

We are attaching hereto tracing and four copies of blueprints covering the said installation.

Very truly yours,

HENRY FORD & SON,
J. F. THOLL.

JFT.C

(Attached to this exhibit are two blueprints showing location of Federal dam and flashboard details.)"

On January 12, 1925, the United States Engineer's office at New York wrote to the defendant the following letter (Plff's. Ex. 18, fols. 843-845):

"War Department,
United States Engineer Office,
First District, New York City,
Room 710, Army Building,
39 Whitehall St.

JB/AF
New York, N. Y.
Jan. 12, 1925.

Subject:

To: The Ford Motor Company.
Green Island Plant,
Troy, N. Y.

GENTLEMEN:

Referring to your request of Sept. 22, 1924, for permission to install flashboards on the Troy Dam *in connection with the operation of your power house,* there is enclosed herewith, copy of regulations approved by the Secretary of War on Dec. 2, 1924, to 'Govern the Regulation of Pool Level and Maintenance of Flashboards at the Federal Dam,

Troy, N. Y., under Water Power License No. 13, Granted to Henry Ford & Son, Inc.'

For and in the absence of the District Engineer,

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers, Assistant.

Encl:
Hudson 377/210."

(Copy of regulations referred to in this exhibit is Defendant's Exhibit 11.)

The regulations enclosed in that letter are in the case as Defendant's Exhibit 11, and are printed as fols. 878 to 884. These regulations are signed merely by the Secretary of War.

They make the positive requirement and direction that the pool shall not be permitted to fall below the fixed crest of the easterly section of the dam which is 15.2 ft. above sea level B. C. D. (or 14.33 ft. above mean sea level which is the datum used by the Federal engineers). This is a mandate and command with which the defendant must comply.

The regulations then provide " flashboards *may be* maintained on the section of the spillway of the dam having an elevation of + 14.33 feet mean sea level (15.2 B. C. D.) in order to increase the elevation of this section to an elevation equal to that of the auxiliary spillway, or + 16.33 feet mean sea level (17.2 B. C. D.)"

This provision is not a command but a mere permission which placed the defendant under no obligation and of which it could avail itself or not as it desired.

There is no reference in the foregoing letters and regulations to any improvement of navigation by means of flashboards. All that is referred to is the operation of defendant's power house.

If the Federal government had determined that these flash-

boards were necessary for the navigation of the river, it would have *required* that they be placed and maintained thereon. It would have required that the pool be maintained at the height of the crest of the flashboards. But no such requirement was made.

The fact that these flashboards were not placed on the dam for navigation purposes but for the private power purposes of the defendant is also conclusively established by admissions in the pleadings.

The complaint, paragraph "ninth" (fol. 18), alleges that the *defendant* placed these flashboards on the dam and that they were so placed *"for the purpose of aiding and improving the operation of its said water power plant and of increasing the power which it could procure therefrom."* The answer, by failure to deny, admits this allegation. (See answer, paragraph "3" (fol. 27), where only the height of the flashboards is questioned.) The pleadings, therefore, establish that the *defendant,* not the government, attached these flashboards and that they were attached for defendant's own private purposes and not for any navigation purpose.

Furthermore, the *defendant* itself requested the Trial Court to find and the Trial Court did find as follows (fol. 120):

> "25. The purpose of defendant in so installing said flashboards was to aid and improve the operation of its said water-power plant and to increase the power which defendant could procure therefrom."

Indeed the defendant now frankly admits in this Court "that the flashboards were installed by defendant for its own private purposes." (Appellant's brief, page 22.)

POINT VI.

The finding of the Trial Court that there was no necessity for the use of these flashboards for navigation purposes and that their effect on navigation is virtually negligible is amply supported by the evidence.

The Trial Court found as a fact. (Fol. 83):

> "Ninth. That the defendant installed said flashboards on said dam in connection with the operation of its power house.
>
> Tenth. That there is no necessity for the use of these flashboards for navigation purposes because the Government dam was designed to be sufficient under normal conditions for navigation purposes without flashboards.
>
> Eleventh. That the effect of the defendant's power plant and the flashboards is virtually negligible so far as navigation is concerned."

The Appellate Division has expressly approved these findings. (Fols. 919-20.)

The defendant's own witness, Colonel Edward Burr, a former officer of the Engineer Corps of the United States Army, testified on cross-examination. (Fols. 557-8):

> "Mr. O'Connor—So the flashboards were only put on in connection with this power plant?
>
> A. So far as I know.
>
> The Court—So that without the power plant there was no necessity for flashboards?
>
> A. Not for navigation purposes because the government dam was designed to be sufficient under normal conditions for navigation purposes without flashboards."

Defendant relies upon the fact that the use of flashboards was proposed in its original application to the Federal Power Commission for a license. This is a boomerang, for in that same application defendant said at page 31 thereof:

> *"So far as navigation is concerned the effect of the power plant will be virtually negligible."*

Owing to the length of this application it was not printed in the record but the defendant will produce the same upon the argument. The context shows that the defendant was referring to the plant *with flashboards.*

The Federal government constructed this dam in co-operation with the Barge Canal work of the State of New York. The Barge Canal Act, Chap. 147, Laws 1903, called for a draft in the river of twelve feet (Sect. 3). The Barge Canal channel is excavated to that depth. The mitre sills at Lock No. 1 Champlain canal and at Lock No. 2 Erie Canal, which are the outlets from the pool formed by this dam, afford a draft of only eleven feet (Sec. 3, Chap. 147, Laws 1903.) The government channel northerly of the dam was excavated to give a channel of twelve feet in depth under the crest elevation of the Federal dam, that is, 15.2 B. C. D. No purpose is served, therefore, by any greater depth of water and Col. Burr so testified.

This Federal dam was completed in 1915 and the pool above it has been used ever since for navigation. From 1915 to 1925 no flashboards were ever installed. (Fols. 556-557.) . If they were in any way necessary for navigation, the government would have installed them at some time during this ten year period.

The defendant introduced some evidence intended to show that the flashboards in some indefinite degree tended to improve conditions for navigation. Vague explanations were made about currents and cross currents above the dam, but the defendant's expert Colonel Burr admitted, after much discussion, that whatever slight benefit there might be of this character above the dam was counteracted by a corresponding detriment below the dam.

But that the Federal government does not consider that these flashboards were needed for navigation is conclusively established by the fact that the Federal government did not *require* that they be maintained. Of what use would they be if no navigator could depend on their being there? The defendant may take them off or put them on whenever it pleases, regardless of any navigation requirements.

Even if we assume that some incidental benefit might, at times, result from the maintenance of these flashboards, that would not in any way justify a deliberate and intentional trespass upon plaintiffs' property committed "by defendant for its own private purposes."

POINT VII.

The mere permission or license from the Secretary of War for the installation of flashboards on the dam does not create any agency nor does it invest the defendant with any "privilege" or "immunity" to seize a portion of plaintiffs' water power without incurring any liability.

On September 22, 1924, the defendant requested that it "be *permitted* to install flashboards on the Troy dam in connection with the operation of our power house." (Fol. 841.) In response to this request (fols. 843-4) the Secretary of War on December 2, 1924, by regulation, granted such permission. (Fols. 881-2.) That regulation said that "flashboards *may* be maintained."

No agency can be spelled out of such a mere permission or privilege. The defendant is under no obligation or duty to install the flashboards. It is under no contract to do so. It is not complying with any order or command of the Secretary of War or of any one else. It is simply taking advantage of a privilege for its own private purposes.

The very statement of the proposition that the Federal government has given the defendant permission to take or damage the property *of others* without responding in damages is sufficient to show its unsoundness.

The most that the record can possibly be construed to indicate is that a Federal official certified (1) that the government had no objection to the flashboards, and (2) that they did not interfere with navigation.

The effect of a permission of the Secretary of War under similar statute is commented on in *Cobb* v. *Commissioners of Lincoln Park,* 202 Ill., 427, where the Court said:

> "We are of the opinion that the act prohibiting the erection of wharves without the consent of the Secretary of War is a mere regulation for the benefit of commerce and navigation, and that *the license or permission of the Secretary of War is only a finding and declaration of such officer that such proposed structure would not interfere with, or be detrimental to, navigation.*"

There is the additional element in our case that the dam is Federal property and the defendant had to get some such permission before it could erect these flashboards on Federal property. Otherwise it would be guilty of trespass.

But such a mere permission or license from either the Federal or the State government does not create an agency nor give any "immunity" from liability for damages to the private property rights *of others.*

In *Pumpelly* v. *Green Bay Company,* 80 U. S. (30 Wall.) 166, the situation was similar to the present one. The defendant constructed a dam which flooded plaintiff's lands and claimed immunity from suit and liability on the ground that it was authorized by an act of the Legislature of the State of Wisconsin to build a dam. The Supreme Court, however, upheld a demurrer to this defense.

In *Sammons* v. *City of Gloversville,* 175 N. Y., 346, the charter of the city authorized it to discharge sewage into Cayadutta creek and: in an action by a riparian owner on that creek, complaining of pollution, the city claimed that that permission in its charter, gave it the right to pollute the creek without incurring liability. The Court of Appeals, however, said (p. 352):

> "This is a permission and not a direction, and a legislative permission neither implies a right to appropriate property, without compensation; nor confers a license to commit a nuisance."

In *Murphy* v. *Commissioners of Emigration,* 28 N. Y., 134, an immigrant entrusted her trunk to a baggage agency licensed by the commissioners to receive the trunks of immigrants arriving at New York. The trunk was lost and the plaintiff endeavored to recover from the commissioners on the ground that they had licensed the agency. The Court of Appeals held, however, that no liability was imposed upon the commissioners by their act in issuing licenses and that the plaintiff must seek relief against the baggage agency.

A similar argument was disposed of in *Brown-Brandt Realty Co.* v. *Saks,* 126 Misc., 336. There the defendant constructed a metal awning or marquise extending from its own building over the sidewalk. The marquise obstructed the public view of the plaintiff's show window in its adjoining building. The court enjoined the defendant from further maintenance of the marquise, holding that the infringements upon plaintiff's property rights could not be justified by the fact that it was erected and maintained pursuant to a municipal permit.

It would indeed be surprising if, despite the Fifth Amendment to the Constitution, a letter, accompanied by some regulations signed by the Secretary of War, gave an individual the right to seize the property of others for his own private purposes with "immunity." Defendant's counsel seems to conceive that this "permission" of the Secretary of War is something like a hunt-

ing license with which the fortunate holder has the "privilege" of going forth and bagging any property which he may desire for his own purposes without any obligation of paying therefor. If our Constitution means anything, neither Congress nor any Federal official has the power to grant such outrageous "privileges" and "immunities" to any favored individual.

> "The legislature could not authorize such an injury without requiring payment for the consequences."
>
> *Sammons* v. *City of Gloversville,* 175 N. Y., 346, at 352.

> "If, therefore, a corporation or an officer should be authorized by a statute to take the property of individuals for any purpose, however public or generally beneficial, without compensation, or, for a private use, making compensation, the pretended authority would be wholly void, and, of course, could afford no protection to any one."
>
> *Bellinger* v. *The New York Central Railroad,* 23 N. Y., 42, at page 48.

As authority for its argument of agency the defendant cites such cases as *Lewis Blue Point Oyster Company* v. *Briggs,* 229 U. S., 82, where the defendant was a *contractor* and had entered into a contract with the United States government to dig a channel in Great South Bay. Of course, the contractor was acting as an agent of the Federal government and his act was the act of that government, but that situation is in no way comparable with the instant one.

The defendant also cites *Alabama Power Company* v. *Gulf Power Company,* 283 Fed., 606. In that case the petitioner, a licensee under the Federal Water Power Act, was endeavoring to exercise the power of *condemnation* of riparian lands along the Coosa river in Alabama. The Court held that Congress could validly authorize the petitioner to exercise the power of con-

demnation. The act, of course, provides compensation for the owners in such proceedings. In the instant case the defendant claims under no such right, but seeks arbitrarily to seize private property without paying for it.

The case of *Jaybird Mining Company* v. *Weir,* 271 U. S., 609, involved the property of Indian wards of the government and the case of *Green Bay, etc., Co.* v. *Patten Paper Company,* 172 U. S., 58, presented a complicated situation arising in Wisconsin out of Federal land grants, and various Federal and State statutes concerning such grants and the public land covered thereby. The issue was as to the respective proprietary interests of the State and the Federal government in the water power. The decision has no application whatever to the instant case.

The effect of governmental permission or license on the public right of navigation.

Most of the cases cited by the defendant concern the effect of governmental permission or license on the *public* right of navigation. They have no application whatever to the instant case, which involves the effect of such permission on *private* property rights. Private property rights are owned by individuals and are protected by constitutional inhibitions while the public right of navigation is owned by no one but is subject to the control of the State legislatures and of Congress.

The cases referred to establish that where the Federal or State government approves the erection of a structure in navigable waters, it may not be complained of as a *public* nuisance—that is, as an interference with the *public* right of navigation. The governmental permission or license is a bar to anyone claiming under the *public* right.

In this class of cases cited by defendant are the following:

Miller v *Mayor of New York,* 109 U. S., 385.

Pennsylvania v. *Wheeling & Belmont Bridge Co.,* 59 U. S., 421.

Wisconsin v. *Duluth*, 96 U. S., 379.

South Carolina v. *Georgia*, 93 U. S., 4.

Sewell v. *Arundel Corp.*, 20 Fed. (2d), 503.

People v. *Hudson River Conn. R. R. Co.*, 228 N. Y., 203.

In *Miller* v. *Mayor of New York, supra*, a navigator of the East river complained of the Brooklyn Bridge as an obstruction to the *public* right of navigation. The Court held that since both the Federal and State governments had approved the erection of this bridge, therefore, no person claiming under the *public right* of navigation could complain of it as a public nuisance—an obstruction of, or interference with, that public right.

In *Pennsylvania* v. *Wheeling & Belmont Bridge Company* (*supra*), the Supreme Court held that even though a bridge was an obstruction to navigation and, therefore, a public nuisance, nevertheless, Congress could, by special act, legalize its maintenance and thereafter a State could not complain of such interference with navigation.

In *Wisconsin* v. *Duluth* (*supra*), the cutting of a channel from Lake Superior into Duluth harbor was instituted by the City of Duluth, Minnesota, but thereafter was carried on by annual Federal appropriations. The State of Wisconsin sought a mandatory injunction requiring the Ctiy of Duluth to fill up the channel which the Federal government had excavated, claiming that the diversion of water resulting from the work was interfering with the navigation of boats from the lake into Superior City, Wisconsin.

In *South Carolina* v. *Georgia* (*supra*), an improvement in Savannah harbor at the mouth of the Savannah river was being made by the War Department under a Congressional appropriation and the State of South Carolina endeavored to enjoin the work on the ground that the channels on the Georgia side were being favored.

In *Sewell* v. *Arundel Corporation* (*supra*), taxpayers in Miami, Florida, attempted to enjoin work in Miami harbor by a government contractor under a Congressional appropriation on the ground that an island was being built up which would be an obstruction to navigation. The Court held that an obstruction to navigation created by Congress did not constitute a public nuisance.

In *People* v. *Hudson River Connecting R. R. Co., supra,* there were two main points involved:

In the *first* of these, it appeared that the State Legislature had by special act, granted a franchise to the defendant to construct a bridge in the bed of the Hudson river at Castleton and thereafter attempted to repeal that act. The court held that the franchise granted by the special act was a property right which could not "be forfeited by mere legislative enactment."

The *second* point involved was that the Secretary of War, pursuant to a special act of Congress, had given his consent to a bridge with piers in the channel of the river and the State Legislature thereafter endeavored, by statute, to require a single span bridge, the State claiming that the piers would constitute an obstruction to navigation. The court held, however, that the Federal power of regulation over navigation is paramount or superior to that of the State over the same subject and that the determination of the Federal government that the piers would *not* constitute an obstruction to navigation could not be overruled by the State.

The case means simply that in the determination of what is or is not a *public* nuisance—that is, an obstruction to the public right of navigation—the Federal power is superior to that of the State. Obviously no such question is involved in our case.

If a boatman claimed that these flashboards interfered with his navigation of the river, or if the State of New York complained that they interfered with the passage of barges along the river, then the foregoing cases which are relied upon by the defendant might be applicable. Then the defendant might properly contend

that the consent of the Federal government was conclusive as against anyone claiming under the public right of navigation.

The plaintiffs in this case are not complaining of any obstruction to navigation. They are not claiming under the *public* right. Concededly (Plff's. Ex. 1, page 5) the plaintiffs own and possess certain lands and water power. They claim that these *private* property rights have been invaded—that a trespass has been committed on privately owned real property. Of course, this presents an entirely different situation. It has never been held that a mere permission of the government invested anyone with any "privilege" or "immunity" to take or injure *private property rights* with impunity.

POINT VIII.

Congress did not, by the Federal Water Power Act, invest any licensee with the privilege of taking of or damaging the property of others with impunity. On the contrary, the Act expressly provides that compensation shall be made for the property of others which may be used or damaged, that the licensee shall be liable for all damages to the property of others, and that no vested rights in waters shall be affected or interfered with.

Even if we assume (though it is not the law) that the government itself might injure or destroy plaintiff's property without liability and even if we assume (which is certainly not the law) that the Federal government might issue a permit to a private corporation which would entitle it to take or damage the property of others without liability, the record in this case shows that Congress did not assume to invest the defendant with any such privilege.

As an affirmative defense the defendant asserts that Congress, by the Federal Water Power Act of 1920 and by the license

granted thereunder, invested the defendant with the "privilege and immunity" of erecting these flashboards free from any liability or responsibility to the plaintiffs for the damage caused thereby to their privately-owned water power and without any obligation on the part of the defendant to respond in damages to the plaintiffs for the water power thereby taken from the plaintiffs and appropriated to the use of the defendant. It is for the *defendant* to establish this alleged grant.

If Congress intended to do such an unjust act, so contrary to the principles of common justice, "it would have said so in words which would not leave such an intention open to doubt." (*Lehigh Valley R. R.* v. *Canal Board,* 146 App. Div., at 161, opinion approved 204 N. Y., at 474.)

Yet there is not a single provision in the Federal Water Power Act which in any way authorizes the exercise of such a power. On the contrary, the Act, in very plain terms, expresses a directly opposite intention.

By Section 21 the licensee is given the power of eminent domain and the District Courts are given power to determine the amount of *compensation* to be paid for "an unimproved dam site or *the right to use* or damage the lands or property of others."

Again in Section 10, Subdivision C, Congress provided:

> "Each licensee hereunder shall be liable for *all damages* occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

In the exercise of still greater caution, Congress provided in Section 27:

> "That nothing herein contained shall be construed *as affecting or intending to affect or in any way to interfere* with the laws of the respective States relating to the control, ap-

propriation, *use,* or distribution of *water* used in irrigation or for municipal *or other uses, or any vested right acquired therein.*"

It is conceded and stipulated in this case that the plaintiffs now own, and they and their predecessors in title for more than a century last past have enjoyed, vested property rights in this water power.

In the face of these specific provisions of the Federal Water Power Act, how can there be any basis for the claim of the defendant that Congress invested it with some piratical privilege to despoil the property of others without any responsibility?

If Congress has the power to authorize the defendant to take or damage the plaintiff's property without compensation, it has not exercised that power.

Lehigh Valley R. R. Co. v. *Canal Board,* 204 N. Y., 471.

Oswego & Syracuse R. R. Co. v. *State,* 226 N. Y., 351.

The license to the defendant was granted. (Fol. 854.)

"*subject, however, to the following conditions*:

1. *The terms and conditions of the Act,* the rules and regulations of the Commission pursuant thereto, in force on the date of this license, and all other statutes pertaining to the subject matter, in so far as applicable, *are hereby made a part of this license as though fully set out herein.*"

The defendant was required by the Power Commission to sign an acceptance of the license which acceptance reads in part as follows (fol. 872):

"THIS LICENSE is also executed by the Licensee this 29th day of March, 1921, in testimony of the *acceptance by the Licensee of all the terms and conditions of the Federal Water Power Act* of June 10, 1920, and of the further conditions imposed in this license."

Thus the defendant expressly and in writing accepted the condition that it should be liable for all damages occasioned to the property of others.

The defendant relies very largely on the fact that, in its application to the Federal Power Commission for a license to construct that plant, it mentioned the proposed use of flashboards. They are mentioned in several places in that application but there are also several statements in the same application which show that the defendant expected to pay for the flowage rights necessary for their maintenance.

On page 41 of the application, as a part of the "Estimated Cost" of the proposed development appears the following:

> *"POOL*
>
> *Field investigation to determine extent of flowage due to flashboards on spillway..* 7,500."

If defendant was to have immunity, why spend this amount of money to determine the damage which would be caused by the flashboards?

On page 42 appears the following:

> "The following items of cost are not included in the above estimate:
>
> 1. Real estate, rights or easements.
> 2. Permanent quarters for power station operators.
> 3. Electric distribution system.
> 4. *Payments for* license, use of government land and water and *flowage rights.*
> 5. Interest during Construction.
> 6. Taxes during Construction.
> 7. Legal Expenses."

Obviously the defendant in its application, and the government in granting the same, contemplated that the defendant would pay for the flowage rights needed for these flashboards.

The burden is upon the defendant to establish this alleged grant from Congress of a special "privilege and immunity." Yet, its contention is directly contradicted by the specific terms of the very statute under which it claims.

Defendant's argument as to Section 10 of the Federal Water Power Act.

The provision of Section 10 that "each licensee hereunder shall be liable for all damages occasioned to the property of others" is so clear, positive and unambiguous that it is a matter of wonderment that anyone would attempt to argue that it means anything other than what it says in so many words.

The argument of defendant in regard to this section is based on a reversal of the true situation. The plaintiffs are not claiming that this section "creates any new right or liability" nor are we claiming under any *Lawrence* v. *Fox* doctrine as suggested by appellant. (Brief, page 23.)

Under the rules of the common law the plaintiffs are entitled to an injunction and damages as a matter of right.

The defendant comes into Court and pleads, *as an affirmative defense,* that our common law right of relief has been taken away by an act of Congress which invested the defendant with the "privilege and immunity" of committing this act without any liability for damages.

We refer to Sections 10, 21 and 27 not as creating any new rights and liabilities, but as preserving existing rights and liabilities without limitation or restriction—as disproving defendant's claim that Congress, by this Water Power Act intended to give it some special "privilege or immunity."

The defendant does not attempt to explain Sections 21 and 27. It confines its efforts to Section 10. But it is submitted that when the three sections are read together, there is not very much left of defendant's argument. The language used by Congress is broad and comprehensive. The licensee is to be liable for "*all* damages occasioned to the property of others." No vested

right is to be effected or in any way interfered with. Compensation is to be made for the use of, or damage to, the lands or property of others.

The appellant argues that the effect of Section 10 must be limited to cases of "taking" in the sense that that term is used in determining constitutional limitations. The difficulty with this argument is that Congress does not limit the liability of the licensee to a "taking." The liability is for "all *damages*" which term has a much broader significance than "taking."

If Congress could have used any broader language to preserve and protect the rights of these plaintiffs, we should like to have the defendant suggest what more it could have said.

The language of the Barge Canal Act in regard to bridges was no more specific, yet this Court held it to be sufficient to defeat an argument similar to defendant's when advanced by the State itself in the prosecution of work by the State which had as its sole object the improvement of navigation.

Lehigh Valley R. R. Co. v. *Canal Board,* 204 N. Y., 471.

Oswego & Syracuse R. R. Co. v. *State,* 226 N. Y., 351.

The defendant also asserts (Appellant's brief, page 23-4) that the only purpose of this section was to declare that the United States should not be liable under the Tucker Act. The obvious answer to this is that the section not only declares that the United States shall not be liable but it also declares that the licensee *shall be liable.*

The argument of the defendant under this point is that if the government itself had done this act, it would have been liable under the Tucker Act (Appellant's brief, page 24) and the decision in *United States* v. *Cress,* 243 U. S., 316 (Appellant's brief, page 33), but that Congress intended that the defendant, a private corporation, committing the same act for its private purposes, should be free and immune from any liability. It is

difficult to believe that Congress had any such remarkable intention.

POINT IX.

The argument of the defendant "that it has purchased from the Federal government the right to maintain these flashboards" is obviously untenable.

At page 22 of appellant's brief is advanced the argument that the defendant has "purchased" from the Federal government the right to erect these flashboards and take our water power. This argument is obviously unsound.

How did the Federal government get the right to sell to the defendant a part of our water power?

The defendant is a private manufacturing corporation and the flashboards were installed "for its own private purposes."

This proposition advanced by the defendant violates the Constitution in two respects—(1) that the government is taking the plaintiff's property for a private purpose, and (2) that it is taking such property without compensation.

POINT X.

The Federal government itself could not take plaintiffs' water power without making compensation therefor as required by the Constitution.

In our opinion the foregoing question is not involved in this case for one reason, if no other, that it is the defendant, not the government, which has committed the act of which we complain. It serves no purpose to argue about what the government could, but did not, do.

However, the defendant repeatedly makes the claim that the government itself could have done this without incurring any

liability. Indeed, the entire argument of the defendant is based upon this proposition. We do not believe that it is the law and we cannot permit it to pass unnoticed.

The defendant concedes that the government would be liable in damages.

Strangely enough the defendant, after arguing that the government could act without liability, concedes that, if the government had erected these flashboards, the plaintiffs could recover for the loss of their water power by virtue of the Tucker Act and under the authority of the case of *United States* v. *Cress,* 243 U. S., 316. (Appellant's brief, pages 24 and 33.)

The *Cress* case is identical with our case except that there the government itself erected the dam which backed water on claimant's water power.

The plaintiffs' conceded property rights in the water power are protected by the Constitution.

It is conceded that the plaintiffs for over 100 years have owned possessed, occupied, and enjoyed this water power and the dam and hydraulic works used in connection therewith. They are located on a portion of the river which the Trial Court found (fols. 88-9) to be incapable of navigation. (*Matter of State Reservation,* 37 Hun, 537.)

The claim is now advanced that the Federal government, under its power to regulate interstate and foreign commerce, can take the whole or any part of this water power from the plaintiffs by raising the Troy dam without making any compensation.

That in such a case there would be a taking, according to common understanding, cannot be questioned. The water power, which the plaintiffs had owned and possessed for a century and in reliance upon which they had invested their money, would have been taken away from them and transferred to the possession and

use of the government, or a licensee, at the Troy dam. It would be difficult to convince anyone that there had been no taking.

"In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."

Monongahela Navigation Co. v. *United States,* 148 U. S., 312, at page 324.

The Fifth Amendment of the Federal Constitution provides:

"Nor shall private property be taken for public use, without just compensation."

"The power to regulate commerce is subject to all the limitations imposed by such instrument (the Constitution) and among them is that of the Fifth Amendment."

Monongahela Navigaion Co. v. *United States,* 148 U. S., 312, at page 336.

"And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, *it prevents the public from loading upon one individual more than his just share of the burdens of government,* and says that when he surrenders to the public something *more and different* from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

Monongahela Navigation Co. v. *United States, supra.*

"Illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provi-

sions for the security of person and property should be liberally construed.

A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Boyd v. *The United States,* 115 U. S., 616, at page 635.

Congress could not authorize the defendant to take any portion of the plaintiffs' property for the operation of its power plant with or without compensation because the use made thereof by the defendant *is not a public use.* The defendant is not a public service corporation, but a private manufacturing company.

Under its power to regulate interstate commerce, Congress could take the property of the plaintiffs for the improvement of navigation which is a public use. *But* if it did so it would be obligated, under the Constitution, to make compensation to the plaintiffs for their property so taken for such public use.

In the *Monongahela Navigation Co.* case, *supra,* the navigation company had a dam and lock in the Monongahela river and the right to take tolls for the use thereof. Congress determined to make a navigation improvement in the river which involved the taking of the lock and dam of the plaintiff and in the act appropriating money therefor Congress expressly directed that nothing be paid for the franchise of the corporation to collect tolls. In spite of this express direction of Congress, the Supreme Court held that compensation must be made.

In *United States* v. *Cress,* 243 U. S., 316, the Federal government, in the course of a navigation improvement in the Kentucky river, erected a dam which backed water upon the dam and water power of the claimant located in a tributary to such an extent that claimant was deprived of most of his fall of water. The

Supreme Court held that compensation must be made. The Court said at pages 319-20 and 326:

"The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable and the ownership of the lands forming their beds and banks (*Barney* v. *Keokuk*, 94 U. S. 324, 338; *Packer* v. *Bird*, 137 U. S. 661, 671; *Hardin* v. *Jordan*, 140 U. S., 371, 832; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358), subject however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations (*Shively* v. *Bowlby*, 152 U. S. 1, 40; *Gibson* v. *United States*, 166 U. S. 269, 272; *Scott* v. *Lettig*, 227 U. S. 229, 243); *the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation* (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471)."

* * * * * * *

"But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised when private property is taken in subordination to the Fifth Amendment. (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471.)"

In a similar case the Supreme Court said:

"Passing to the third question, it is contended that what was done was done by the government in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that

if in doing any work therefor injury results to riparian proprietors or others it is an injury which is purely consequential and for which the government is not liable. But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

United States v. *Lynah,* 188 U. S., 445, at page 471.

In this State it is well established that when water power is taken or impaired in the course of a navigation improvement, compensation must be made.

American Woolen Co. v. *State,* 195 App. Div., 698.

Commr's of Canal Fund v. *Kempshall,* 26 Wend., 414.

Ex parte Jennings, 6 Cowen, 518.

In the *American Woolen Co. case, supra,* a Barge Canal dam was constructed by the State in the Oswego river to such height that it backed water on claimant's water power upstream, and for this the State was held liable. The Court said at pages 703-4:

"*We follow the authority of Oswego & Syracuse R. R. Co.* v. *State* (226 N. Y. 351) that to destroy property is to appropriate it, and we hold that the *destruction of the water rights of the claimant at the level long existing, if they were so destroyed, is an appropriation of the property,* and that if property is actually taken by the State for a public use, and the owner is excluded from its possession and loses the rights and benefits to which he was theretofore entitled, then there is an appropriation of the property for which the State is bound to make compensation if a claim is seasonably filed. (*Scriver* v. *Smith,* 100 N. Y. 471; *Pumpelly* v. *Green Bay Co.,* 13 Wall., 166; *United States* v. *Cress,* 243 U. S. 316, 330; *Fulton Light, H. & P. Co.* v. *State of New York,* 200

N. Y. 400; *Meneely* v. *Kinser Construction Co.*, 128 App. Div. 799; *United States* v. *North American Co.*, 253 U. S. 330; *Oswego & Syracuse R. R. Co.* v. *State*, supra.)"

Our case is not one of mere "consequential injury." The plaintiffs' real property, an inherent part of their estate (*United P. B. Co.* v. *Iroquois P. P. Co.*, 226 N. Y., at pages 44-7), has been invaded and taken. It is a case of trespass upon real property and a trespass can never be treated as a mere consequential injury.

United States v. *Cress, supra.*

American Woolen Co. v. *State, supra.*

The cases cited by defendant have no application to this case.

The brief of defendant consists mostly of generalizations taken from opinions in cases, the facts of which bear no resemblance to those here involved. The issues in the cases cited were so entirely different that the quotations are meaningless in the instant case.

Most of the cases referred to involve the power of the Federal government to remove public nuisances—that is, structures which obstruct navigation—and to prevent other interferences with navigation.

In *Monongahela Bridge Company* v. *United States*, 216 U. S., 177, and *Union Bridge Co.* v. *United States*, 204 U. S., 364, the Court held that Congress had the power to authorize the Secretary of War to direct the alteration or removal of bridges which obstructed this public right of navigation and which erections were, therefore, public nuisances.

In *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S., 251, it was held that the War Department might lawfully remove a portion of a pier erected in a harbor in Virginia which interfered with a navigation improvement being made in the harbor under a Congressional appropriation.

In *United States* v. *Rio Grande Dam & Irrigation Company*, 174 U. S., 690, it was held that the United States might properly sue for an injunction to restrain an irrigation company from

diverting the waters of the Rio Grande river to such an extent that the use thereof for navigation was interfered with.

Philadelphia Company v. *Stimson,* 223 U. S., 605, concerned the power of the Secretary of War under an act of Congress to lay out harbor lines in the harbor of Pittsburgh.

Defendant also cites three cases which concern interferences with navigation in front of a riparian owner's premises.

In *Transportation Co.* v. *Chicago,* 99 U. S., 635, the City of Chicago was constructing a tunnel under the Chicago river and the plaintiff claimed that it had suffered temporary injury during the course of construction (1) by obstructions in the street impeding access to its building, and (2) by a coffer dam in the river which, for a time, prevented boats from reaching its wharves. The Court says (page 642):

> "In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot."

In *Scranton* v. *Wheeler,* 179 U. S., 141, the navigation of boats from plaintiff's land to the main channel of St. Mary's river was obstructed by the erection of a pier in the river by the United States government in connection with the St. Mary's canal.

In *Bedford* v. *United States,* 166 U. S., 269, the same situation was presented on the Ohio river except that the structure placed in the river was a dyke.

Defendant refers to several decisions involving questions of conflicting *proprietary interests* in water power or land under water. These cases have no application to this case for the reasons (1) that the defendant has stipulated and conceded that plaintiffs own the water power, and (2) that the defendant sets up no claim of title and the only possible claimant is the State of New

York which is not a party to the action and is in no way interested therein.

Hinkley v. *State of New York,* 234 N. Y., 309, involved only a question of title to lands under tide water as between the State and an individual. The decision did not even pass upon the question of as to whether title by adverse possession could be obtained as against the State. (Page 316.)

Defendant relies very strongly upon the *Tibbits* case, 17 Wend., 571, in which the State itself, not a private corporation, erected the old State dam in the Hudson river at Troy, and thereby backed water upon the water power of Tibbits in the southerly sprout of the Mohawk river. The Supreme Court held that Tibbits was the owner of this water power by virtue of his ownership of the bank (5 Wend., 423). Subsequently after the case went back for trial and an award had been made, an appeal was taken to the Court for the Correction of Errors and the award was reversed by a vote of 13 to 11, thirteen senators voting for reversal and ten senators and Chancellor Walworth voting for affirmance. (Page 630.)

Tibbits claimed title under the Dutch patent to Van Rensselaer as confirmed by later English patents. It also appeared that the tide ebbed and flowed at the location of this water power. (Page 605.)

Chancellor Walworth, in his very exhaustive opinion for affirmance, declared that the common-law rule of riparian ownership of the bed of fresh water rivers applied in this State, and that it should be applied to the construction of the Van Rensselaer patent and the confirmatory patents.

On the other hand, Senator Beardsley, in his opinion, asserted that the common-law of England could not be applied to the construction of a Dutch patent and that instead, the civil law should be applied; that under this law the title to the bed did not pass to the riparian proprietor. (Page 609.) He pointed out that since the tide ebbed and flowed at this point, title did not pass to the riparian owner even under the common-law rule. (Page 605.)

He also declared that the common-law rule of riparian ownership did not apply to any of the navigable fresh water rivers of the State.

Senator Tracey, writing the third opinion in the case, concurred with Senator Beardsley as to the question of title, and also urged that even though Tibbits did own the bed of the river, nevertheless, the State could destroy the water power without making compensation to him.

With three divergent opinions and the vote of 13 to 11 it is impossible to say that the decision stands for any particular proposition.

Only five years later in the *Kempshall* case, 26 Wend. 404, the opinions of Senator Beardsley and Senator Tracey were practically repudiated by the same court (pages 415-7) and, as the United States Supreme Court says in *United States* v. *Cress,* 243 U. S., at page 322, the decision has been limited to the holding that title to the bed of the Mohawk is in the State.

This Tibbits case is not an authority in our case, for the reason that the defendant has stipulated that the plaintiffs do own the water power and there is, therefore, no question of title involved.

Appleby v. *City of New York,* 271 U. S., 364, was a dispute between an individual and the city as to the ownership of a parcel of land under water in New York harbor.

United States v. *Chandler-Dunbar Co.,* 229, U. S., 53, arose on the St. Mary's river in the State of Michigan. In 1787 the Federal government owned all the land in the Northwest Territory. In that year Congress enacted the Northwest Ordinance which provided:

> "The navigable waters leading into the Mississippi and the St. Lawrence and the carrying places between the same, shall be common highways and forever free as well to the inhabitants of said territory as to the citizens of the United States and those of any other State that may be admitted into the confederacy, without any tax, impost or duty therefor."

The courts of the states subsequently erected in that territory and the Federal courts have held that this provision of the Northwest Ordinance effected a reservation of the rivers in that territory and that subsequent patentees from the government or the states acquired very limited property rights in the waters mentioned, and further, that the ordinary rules of the common-law were not applicable.

Economy Light Co. v. *United States,* 256 U. S., 113 at pages 118-119.

Moore v. *Sanborne,* 2 Mich., 519, 525.

Lorman v. *Benson,* 8 Mich., 18, 26.

Tyler v. *People,* 8 Mich., 320, 332.

The Montello, 87 U. S. (20 Wall.), 430.

The Daniel Ball, 77 U. S. (10 Wall.), 557.

"The public interest in navigable streams of this character in Illinois and neighboring States, and the federal authority over such as are capable of serving commerce among the States, does not arise from custom or implication, but has a very definite origin. By Article 4 of the compact in the Ordinance of July 13, 1787, for the government of the territory northwest of the river Ohio, it was declared: 'The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.' 1 Stat. 51, 52, note; Rev. Stats. U. S., 1878 ed. pp. 13, 16."

Economy Light Co. v. *United States,* 256 U. S., 113, at pages 118-19.

It is this peculiar local condition of the law which produced the decision in the *Chandler-Dunbar* case. The conclusion of the

Court was not that the property of the claimant could be taken without compensation, but that the claimant had no property rights rights in the water power of St. Mary's river.

The Court commenced its opinion with the statement (page 60) that one of the controlling questions was "whether the Chandler-Dunbar Co. has any private property in the water power capacity of the rapids and falls of the St. Marys river which has been taken and for which compensation must be made under the Fifth Amendment to the Constitution."

It states (page 74) that the Chandler-Dunbar Co. "had no property right in the river which has been 'taken'."

It then concludes this point of the case as follows (page 76):

> "Having decided that the *Chandler-Dunbar Company as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river,* the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland. The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use."

Of cource, the Northwest Ordinance was never applicable within the State of New York.

Plainly that decision can have no application to the instant case where the defendant concedes that the plaintiffs do own the water power.

The facts involved in the other cases cited by the defendant are so dissimilar to the instant case that they require only brief comment.

Bedford v. *United States,* 192 U. S., 217, concerned changes in the channel of the Mississippi river, the plaintiff complaining

because the government constructed a revetment to keep the river in its then channel instead of permitting it to change.

In *Scott* v. *Donald*, 165 U. S., 58, was presented the question of exemplary damages for malicious interference with personal rights.

Kiff v. *Youmans*, 86 N. Y., 324, was an action for assault and battery.

The limited significance of the case of *Bellinger* v. *New York Central R. R. Co.*, 23 N. Y., 42, cited by the defendant, is explained in the opinion of the Court of Appeals in *Burt Olney Canning Co.* v. *State*, 230 N. Y., 351.

In *Burnmaster* v. *State*, 186 App. Div., 131, the court said (page 133), "here there has been no interference with the water-course."

In *Chase-Hibbard M. Co.* v. *Elmira*, 207 N. Y., 460, the city simply restored the waters of the river to their old channel from which they had been diverted. As the Court said (page 466), there was no "taking nor directly invading the plaintiff's premises."

In *Waterloo Woolen M. Co.* v. *Shannahan*, 128 N. Y., 345, an injunction was sought restraining the performance of certain canal work on the ground that the act authorizing it was unconstitutional. The Court held the act to be constitutional and declared that if the plaintiff suffered any damage by reason of the prosecution of the work, it had the right to recover such damage in the Court of Claims.

Atwater v. *Trustees of Canandaigua*, 124 N. Y., 602, was decided on the theory that the act resulted in no permanent flooding (page 610), whereas in our case there is a permanent taking of a portion of our water power by the defendant.

Central Pacific Railroad v. *California*, 162 U. S., 91, upheld the right of a state to value and tax a Federal franchise to operate an interstate railroad.

Southern Pacific Railroad v. *United States*, 183 U. S., 519, was a dispute between the railroad and the government as to

boundary lines of grants made out of public lands to the railroad.

In *Frisbie-Stansfield Knitting Co.* v. *State of New York,* 189 App. Div., 341, the claimant had not seasonably filed a notice of intention to file a claim. An act was passed extending the time to file claims in "appropriation" cases. The Court held that this was not "an appropriation" case, but one in the nature of tort and, therefore, not within the statute of extension. It did not hold that the claimant had no remedy, but merely that it had lost its remedy by failure to act promptly and that the statute did not relieve it from this omission.

In *Clallam County* v. *United States,* 263 U. S., 341, it was held that a state could not tax the property of a corporation created by the United States during the war for war purposes, every interest in which was owned by the government itself.

In *Westfall* v. *United States,* 274 U. S., 256, it was held that where a state bank had become a member of the Federal Reserve System, the criminal laws of the United States applicable to national banks applied to the officers of such state banks.

POINT XI.

It is respectfully urged that a writ of certiorari herein be denied.

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